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REPORTS

OF

515

CASES ARGUED AND DETERMINED

John IN THE *White*

SUPREME COURT OF ALABAMA,

J. C. Compton *Atty. at Law*

During part of January Term, 1847.

Selma Ala.

1869.

VOLUME XI.

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BY THE JUDGES OF THE COURT.

TUSCALOOSA:

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W. H. ... *W. H. ...*
Entered according to act of Congress, in the year 1847,

BY THE JUDGES OF THE SUPREME COURT OF ALABAMA,

(For the use of the State of Alabama,)

In the Clerk's Office of the District Court of the United States for the
Middle District of Alabama.

W. H. ...

1847.

OFFICERS
OF
THE SUPREME COURT,
DURING THE TIME OF THESE DECISIONS.

HENRY W. COLLIER, CHIEF JUSTICE.
JOHN J. ORMOND,
HENRY GOLDTHWAITE, } ASSOCIATE JUSTICES.

THOMAS D. CLARKE, ATTORNEY-GENERAL.
JAMES B. WALLACE, CLERK.

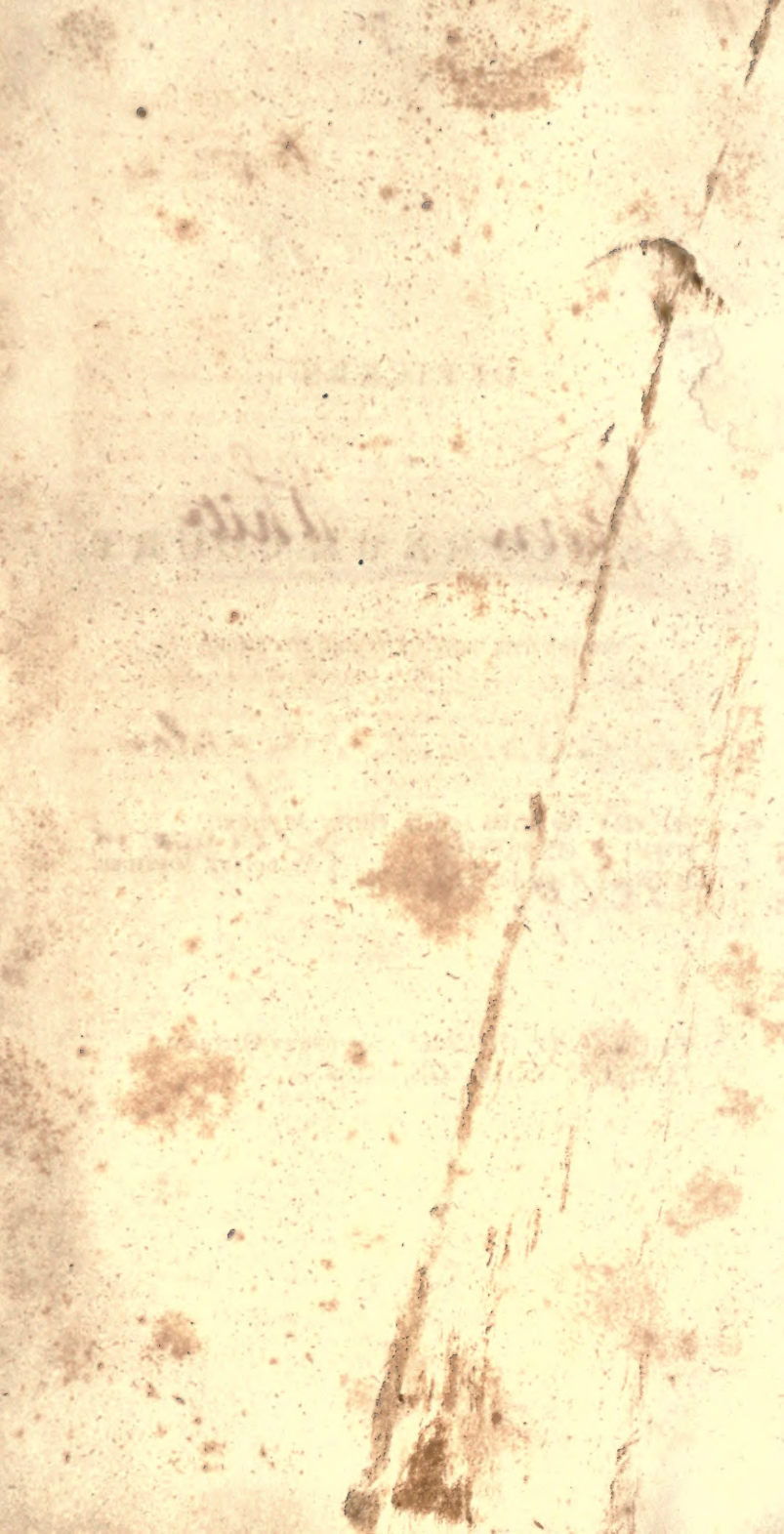


TABLE OF CONTENTS.

e and Knox	997	Caldwell v. Br Bank Mobile	549
Davis	164	Caldwell v. Harrison	755
and Wilkinson	128	Calhoun, et al and McCartney, et al	110
v. M'ry R. R. Co. et al..	437	Camp v. Hatter	151
and Powell	318	Campbell's Adm'r v. Campbell's cre-	
Anderson and Clk Co. C. Lowndes,	410	ditors.....	730
Anderson and Watson & Watson..	43	Campbell's creditors and Campbell's	
Anderson v. Brooks.....	953	Adm'r	730
Andress, et al v. Crawford, use, &c.	853	Cameron, Ex'r, v. Clark, Smith & co.	259
Andress v. Longmire's Adm'r, &c.	166	Carter v. Pickard.....	673
Andrews & Hall, Adm'rs, v. Burns,		Castles, et al and Ledbetter.....	149
Adm'r	691	Cawthorn v. Knight, Guardian, &c	579
Armstrong v. Dargan & Mays.....	506	Cawthorn v. Knight.....	268
Atwood v. Smith.....	894	Chandler v. McPherson, et al.....	916
Baldwin, et al v. Gully.....	716	Chandler and Faulkner & Faulkner	725
Bank of the State and Riggs, et al.	160	Chandler and Glover, use, &c.....	161
Bank of the State and Riggs, et al.	183	Child and Locket.....	640
Bank Br at Mobile and Godbold.....	191	City Council Mont'y and Murphy...	586
Bank of the State and E. B. & J.		Clarke, and another, and Crayton,	
Colgin	222	use, &c.....	787
Bank Br at Decatur v. Rhodes	283	Clark, Smith & co. and Cameron,	
Bank Br at Mobile v. Caldwell	549	Ex'r	259
Bank State Ala and Gary, et al.....	771	Claiborne v. Harris, and another.....	647
Bank at Mont'ry and Henderson.....	855	Clarissa, a slave, and The State....	57
Beason v. Riddle.....	743	Clarke, T. J. & S. J. Gary.....	98
Beavers & Jemison v. Smith.....	20	Clealand v. Walker.....	1058
Bell v. Killcrease.....	685	Clements and Wooley.....	220
Benham and Savage	49	Clements, &c. v. Moore.....	35
Bigelow & Co. and De Witt.....	480	Clements v. Elliott.....	360
Billingsley v. Harrell.....	775	Clerk Co. Ct. Lowndes v. Anderson	410
Bird and Comelander	913	Clopton v. Martin	187
Bishop's Heirs v. Hampton	254	Coker and Robertson	466
Bothwell, et al and Watson, et al..	650	Colgin, E. B. & J. v. The State B'k,	222
Bowen v. Snell, use, &c.....	379	Colgin and Gary	514
Boyd & Macon v. McIvor.....	822	Collins & Co. v. Hyslop & Son.....	508
Bradford v. Haggerthy.....	698	Comegys v. McCord.....	932
Brooks and Anderson	953	Comelander v. Bird.....	913
Broughton v. Robinson.....	922	Connelly's Adm'r, et al v. Kavan-	
Brown, use, &c. and Taliaferro.....	702	augh	169
Brown v. Turner.....	752	Conner v. Tuck	794
Brown and Hale, et al	87	Cox v. Easley, et al.....	362
Brown v. Isbell	1009	Cox v. Williamson.....	343
Br Bk at M'ry and Gilchrist	408	Crawford, use, &c. and Andress, et al	853
Bucks and King	217	Crayton, use, &c. v. Clark, et al.....	787
Burns, Adm'r, and Andrews & Hall,		Cross v. Worrall	108
Adm'rs	691	Curry & Haynee v. Robinson, use,	
Burt, use, &c. v. Hughes	571	&c.....	266
Butler v. Butler	668	Dargan & Mays and Armstrong	506
Butler and Butler	668	Dargan v. Waring, et al.....	988
Butler v. Lee.....	885	Davis v. Allen	164

Dean, et al v. Portis, Judge, &c.....	104	Hancock and Moore.....	245
Dearing v. Windham	204	Hanrick, et als and Fitzpatrick.....	783
Desha, Sheppard & co. and Stewart.....	844	Harrell and Billingsley	775
De Witt v. Bigelow & co.....	480	Harrison and Caldwell.....	755
Dill & co. and Hindman.....	689	Harrison and Hooe	499
Doe ex dem. Farmer's Heirs v. Es-		Harris, and another, and Clai-	
lava.....	1028	borne.....	647
Doe ex dem. Kennedy's Ex'rs v.		Hatter and Camp.....	151
Jones.....	63	Hawkins' Adm'rs and Nations.....	859
Doswell, et al v. Stewart.....	629	Heirs of McVoy v. Hallett & Walker.....	864
Dothard, et al and Reynolds	531	Hemmingway v. Moore and Cren-	
Douglass, et al v. Terrell, treasurer.....	583	shaw	645
Downman and Frow & Ferguson	880	Henderson and Prosser.....	484
Drinkwater v. Holliday	134	Henderson & Hudson v. Gandy's	
Easley, et al and Cox.....	362	Adm'r	431
Eatman, et al and Miller.....	609	Henderson v. Bk at Montgomery	855
Edwards v. Gibbs, Judge, use, &c.....	292	Herrington and Self	489
Eldridge, and another, v. Turner,		Herrin v. Woodward.....	792
&c.....	1049	Hightower, et al v. Kennedy, et al.....	562
Elliott and Clements.....	360	Hindman v. Dill & co.....	689
Ellzy and Oliver	632	Hines and Mullikin	634
Eslava and Doe ex dem. Farmer's		Hobson and Jacott, Smith, Bright	
Heirs.....	1028	& Jones	434
Everett and Martin.....	375	Holliday and Drinkwater	134
Ezzell and Monroe	603	Holt and Oliver	574
Falls v. Weissinger	801	Hooe v. Harrison.....	499
Faulkner & Faulkner v. Chandler.....	725	Hooper and Nance	552
Fisher & Phelps and Sanders	812	Hoot, et al v. Sorrell, et al.....	386
Fitzpatrick v. Hanrick, et als.....	783	Houston v. Stanton & Stanton.....	412
Freeman v. McBroom, et al	943	Howe and Pearson	370
Frow & Ferguson v. Downman.....	880	Hughes and Burt, use, &c.....	571
Gamble's Adm'r and Gamble	966	Hughes v. Ringstaff	563
Gamble v. Gamble's Adm'r	966	Hunley's Ex'rx v. Shuford.....	203
Gandy's Adm'r and Henderson &		Hunt, et al and Lyon, et al.....	295
Hudson.....	431	Hyslop & Son and Collins & co.....	508
Garrett and Ricketts, et al.....	806	Ingersol and Pinkard	9
Gary et al v. Bank State Ala.....	771	Isbell and Brown	1009
Gary v. Colgin.....	514	Ives and Thompson.....	239
Gary and T. J. & S. Clarke.....	98	Ivey and Phifer	535
Gayle and Pearson, et al	278	Ivy and The State	47
Gibbs, Judge, use, &c. and Edwards.....	292	Jacott, Smith, Bright & Jones v.	
Gilchrist v. Br Bk at Montgomery.....	408	Hobson	434
Gilder v. Jeter.....	256	Jeter and Gilder	256
Givens & co. v. Robbins, Painter,		Johnson and Neil.....	615
& co.....	156	Jones, and another, and Welch.....	660
Givens, use, &c. v. Rogers, et al., ..	543	Jones and Doe ex dem. Kennedy's	
Glassel and Waddel	568	Ex'rs.....	63
Glover, use, &c. v. Chandler, et al.....	161	Jones v. Kolisenski	607
Godbold v. Br Bank Mobile.....	191	Julian and wife v. Reynolds	960
Gookin v. Richardson.....	889	Kavanaugh and Connelly's Adm'r,	
Gordon and Trammell & McCarty.....	656	et al	169
Governor, use, &c. v. Stonum,		Kenan, Ex'x, and Starke & Moore.....	818
adm'r	679	Kennedy, et al and Hightower, et al.....	562
Gray and Kyle.....	233	Killcrease and Bell	685
Green, et als, and Terrell, et als.....	207	King v. Bucks	217
Gully and Baldwin, et al.....	716	Knight and Cawthorn.....	268
Haggerthy and Bradford	698	Knight and Speight	461
Hale and Westmoreland, &c.,	122	Knight, Guardian, &c. and Caw-	
Hale, et al v. Brown.....	87	thorn.....	579
Hallett & Walker and Heirs of Mc-		Knight and Smith & Bowdon	618
Voy	864	Knight v. Turner's Ex'r	636
Hampton and Bishop's Heirs.....	254	Knox v. Abercrombie	997

Kolisenski and Jones	607	Nations v. Hawkins' Adm'rs	859
Krebs, Ex'r, and Nicholas.....	230	Neil v. Johnson.....	615
Kyle v. Gray.....	233	Nicholas v. Krebs, Ex'r	230
Lacy, Terrell & co. v. Rockett.....	1002	Noland & Noland and Locke.....	249
Lang, et al v. Pettus	37	Nolly v. Wilkins, Adm'r, &c	872
La Roque & Hatch and Russell.....	352	Officers Cir. Ct. Mobile and Patter-	
Lawrence and Turner.....	426	son, et als.....	740
Ledbetter v. Castles, et al.....	149	Oliver v. Ellzy	632
Lee and Butler	885	Oliver v. Holt	574
Leigh & co. v. Lightfoot	935	Page, and another, v. The State.....	849
Lightfoot and Leigh & co.....	935	Parker and wife v. McGaha, Adm'r, 521	
Litchfield and McClure	337	Paschall v. Whitsett	472
Locke v. Noland and Noland	249	Patterson and Sawyer's Adm'r.....	523
Locket v. Child	640	Patterson, et als v. Officers Cir. Ct.	
Lockwood, et al and Pond, et al.....	567	Mobile	740
Logan and Rowland, et al.....	663	Paullin and Taylor	512
Longmire, Adm'r, &c. and Andress 166		Pearson v. Howe.....	370
Lovett and Lovett	763	Pearson, et al v. Gayle.....	278
Lovett v. Lovett	763	Pettus and Lang, et al	37
Lyon, et al v. Hunt, et al	295	Petty v. Wafford.....	143
Mahone v. Reeves	345	Phifer and Ivey	535
Marshall and Traylor	458	Pickard and Carter	673
Massey v. Steele's Adm'r	340	Pinkard v. Ingersol	9
Martin and Clopton	187	Ponders and Moore	815
Martin v. Everett	375	Pond, et al v. Lockwood, et al.....	567
Mauldin, Montague & co. and Rob-		Portis, Judge, &c. and Dean, et al. 104	
inson & Caldwell	977	Powell v. Allred	318
McAlexander and Wright	236	Price v. Thomason	875
McBeth v. McBeth	596	Prosser v. Henderson	484
McBeth and McBeth.....	596	Puryear & Williamson and Weaver, 941	
McBroom, et al and Freeman	943	Ragan and Ulrick, et al	529
McCartney, et al v. Calhoun, et al, 110		Reeves and Mahone.....	345
McClure v. Litchfield.....	337	Reynolds' Adm'rs v. Reynolds' Dist 1023	
McCord and Comegys.....	932	Reynolds' D. and Reynolds' Ad'rs, 1023	
McCullough, et al v. Walton	492	Reynolds v. Dothard, et al.....	531
McGaha, Adm'r, and Parker and		Reynolds and Julian and wife	960
wife	521	Rhodes and Br Bank at Decatur...283	
McGehee and Walke	273	Richardson and Gookin	889
McIvor and Boyd & Macon	822	Ricketts, et al v. Garrett	806
McLane v. Spence, Adm'r.....	172	Riddle and Beason	743
McPherson, et al and Chandler.....	916	Riggs, et al v. The Bank of the State 160	
McVoy's Heirs v. Hallett & Walker, 864		Riggs, et al v. The Bank of the State 183	
Miller v. Eatman, et al.....	609	Ringstaff and Hughes.....	563
Miller & co. and Walker, et al.....	1067	Rives and Myer, et al.....	760
Milton v. Rowland	732	Robbins, Painter & co. and Givens	
Mitchell v. Sanford	695	& co.....	156
Moore and Clements, &c.....	35	Robertson v. Coker	466
Moore v. Hancock	245	Robinson and Broughton	922
Moore v. Ponders.....	815	Robinson, et al v. Robinson.....	947
Moore & Crenshaw and Hemming-		Robinson and Robinson, et al	947
way	645	Robinson & Caldwell v. Mauldin,	
Monroe v. Ezzell.....	603	Montague & co	977
Montgomery City Council and Mur-		Robinson, use, &c. and Curry and	
phy	586	Haynee	266
Mont'y R. R. co. v. Allen	437	Robinson and Smith	270
Morgan v. The State	289	Robinson and Smith	840
Moyler v. Moyler.....	620	Rockett and Lacy, Terrell & co. 1002	
Moyler and Moyler	620	Rogers, et al and Givens, use, &c 543	
Mullikin and Hines	634	Rogers v. Russell.....	456
Murphy v. City Council Mont'y.....	586	Rowland, et al v. Logan	663
Myer, et al v. Rives	760	Rowland and Milton	732
Nance v. Hooper.....	552	Russell v. La Roque & Hatch	352

Russell and Rogers	456	Taylor v. Paullin	512
Russell and Tilton	497	Taliaferro, Adm'r, v. Brown, use, &c 702	
Rutledge, Adm'r, and Spence, et al, 557		Terrell, et als v. Green, et als	207
Rutledge, Adm'r, &c. and Spence, et al	590	Terrell, Treasurer, and Douglass, et al	583
Sanders v. Fisher and Phelps	812	Thompson and Venable	147
Sanford and Mitchell	695	Thomason and Price	875
Savage v. Benham, Adm'r	49	Thompson and Spence	746
Sawyer's Adm'r v. Patterson	523	Thompson v. Iyes	239
Self v. Herrington	489	Tilton v. Russell	497
Sellers, Guardian, &c. v. Smith	264	Trammell and McCarty v. Gordon, 656	
Shreeve and Knapp v. The State, 676		Traylor v. Marshall	458
Shuford and Hunley's Ex'r	203	Tubb and Sledge, Ex'r	383
Sledge, Ex'r, v. Tubb	383	Tuck and Conner	794
Smith and Sellers, Guardian, etc	264	Turner's Ex'r and Knight	636
Smith v. Robinson	270	Turner and Brown	752
Smith and Beavers and Jemison	20	Turner, etc. and Eldridge, and another	1049
Smith & Bowdon v. Knight	618	Turner v. Lawrence	426
Smith and Atwood	894	Ulrick, et al v. Ragan	529
Smith v. Robinson	840	Venable v. Thompson	147
Snell and Bowen, use, &c	379	Waddell v. Glassel	568
Sorrell, et al and Hoot, et al	386	Wafford and Petty	143
Spears and Williams	138	Walke v. McGehee	273
Speight v. Knight	461	Walker and Clealand	1058
Spence, et al v. Rutledge, Adm'r, 557		Walker, et al v. Miller & co	1067
Spence, et al v. Rutledge, Adm'r, &c 590		Wall v. Williams, use, &c	826
Spence v. Thompson	746	Walton and McCullough, et al	492
Spence, Adm'r, and McLane	172	Waring, et al and Dargan	988
Stanton & Stanton and Houston, 412		Watson and Watson v. Anderson	43
Starke and Moore v. Kenan, Ex'r, 818		Watson and Strange, et al	324
State and Weissinger	540	Watson, et al v. Bothwell, et al	650
State and Page, and another	849	Weaver v. Puryear and Williamson, 941	
State Bank and Riggs, et al	160	Weissinger v. The State	540
State Bank and Gary, et al	771	Weissinger and Falls	801
State v. Ivy	47	Welch v. Jones, and another	660
State v. Clarissa, a slave	57	Westmoreland, etc. v. Hall	122
State Bank and Riggs, et al	183	White v. Strother, et al	720
State Bank and E. B. and J. Colgin, 222		Whitsett and Paschall	472
State and Morgan	289	Wilkinson v. Allen, et al	128
State and Shreeve and Knapp	676	Wilkins, Adm'r, and Nolly	872
State and Swan	594	Williams, use, etc. and Wall	826
Steele's Adm'r and Massey	340	Williams v. Spears	138
Stewart and Doswell, et al	629	Williamson and Cox	343
Stewart v. Desha, Sheppard & co. 844		Windham and Dearing	204
Stoker, et al v. Yerby	322	Woodward and Herrin	792
Stonum, Adm'r, and Governor, use, &c	679	Wooley v. Clements	220
Strange, et al v. Watson	324	Worral and Cross	108
Strother, et al and White	720	Wright v. McAlexander	236
Swan v. The State	594	Yerby and Stoker, et al	322

REPORTS
OF
CASES ARGUED AND DETERMINED
AT THE
JANUARY TERM, 1847.

PINKARD v. INGERSOL, ET AL.

1. A deputy clerk is authorized to take and certify the acknowledgement of a deed, so as to warrant its registration.
2. The assent of a grantor to the provisions of a deed conveying property in trust for his benefit, is to be inferred from his acceptance of the deed at the time of its execution.
3. The assent of one *cestui que trust* will not validate a deed which expressly or by implication requires the assent of others.
4. Where parties having actual or colorable claims to property conveyed by two different deeds of trust meet, and enter into a special agreement with reference to the trust property, this agreement is to be considered as ascertaining their respective rights and will in equity, as between the parties, furnish the basis for settling their rights independent of the trust deeds.

Writ of error to the Court of Chancery for the fourteenth district.

THE case made by the bill is this: About the first of August, 1836, the complainant, Pinkard, sold to the defendant, Ingersol, and one Underwood, twenty-eight slaves, for which the purchasers executed their notes at one, two and three years' date. The notes were not paid at maturity, and on the one first due, Underwood was sued in Georgia, and all the amount collected except \$2362.

On the 10th of August, 1839, Ingersol executed a deed of trust by which he conveyed certain tracts of land, several lots in Girard and thirty-three slaves, (including a portion of those purchased from Pinkard) to one Bailey, to secure the payment to the complainant of \$4000 of the sum then due on the notes on the 1st January, 1840, and \$8993 46, to be paid on the 1st January, 1841. At this time the note secondly due had been reduced to judgment, (as recited in the deed) in the State of Georgia. On the 30th of August of the same year, the complainant agreed with Ingersol to take back twelve of the slaves originally sold to him and Underwood at the price of \$8,000, leaving some \$12,000 remaining due besides interest.

Previously to the execution of this deed of trust, Ingersol on the 21st March, 1839, had executed another to one McDougald, conveying the same property as a security for certain notes described in the deed, all of which fell due on or previous to the 1st January, 1840. This deed provides, that Ingersol should retain possession of the property until the expiration of twelve months from the date, after which period the grantee was invested with the power to enter and sell. The period having expired, McDougald advertised the property for sale, and the complainant then filed his bill, alledging that the deed to McDougald was fraudulent, and the debts either simulated or paid by Ingersol. The prayer is, that a discovery may be had of the fraud, and that if any thing is really due, that the property may be sold under the direction of the court, and the amounts due to the complainant on the notes paid him out of the surplus. To give color to this prayer, there is an allegation in the bill that the deed of trust securing a less sum than the amount of the notes was not intended to release Ingersol from the payment of the balance, and it is stated a judgment was recovered in Alabama on one of the notes, on which an execution was returned, "no property."

The answer of Ingersol admits the purchase of the slaves, the giving of the notes and the execution of the deeds of trust set out in the bill, and insists that the one to McDougald is fair and *bona fide*, as well as that the debts therein mentioned are due as recited. He denies that any thing more is

due to the complainant than the two sums secured to be paid as mentioned in the deed of trust in that connection. In support of this denial, he makes an exhibit an agreement under his own and Pinkard's signatures, which after reciting the previous indebtedness of Ingersol by notes and judgments, stipulates that he was to convey twelve slaves to Pinkard, as well as to transfer them to Forsyth in Georgia by the 9th of September; warranting the delivery of the same free from any debt, demand or lien which Ingersol may have contracted. It was further agreed that Ingersol should remove the incumbrance of McDougald as well as one to one Watson, (which will presently be stated) and should satisfactorily secure the sum of \$4,000 to be paid to Pinkard on the 1st January, 1841. After the performance of these acts, Pinkard was to release Ingersol from any further payment, as well as to deliver up the trust deed executed to Bailey. The agreement, however, was not to be held to discharge Underwood.

He also sets up a conveyance previously made by him on the 21st March, 1839, to one Watson, by which the same property conveyed in the deeds to McDougald and Bailey is conveyed in trust to secure Watson and other creditors therein named. All the debts proposed to be settled by this deed were past due at its execution, and one provision in it is, that the property shall not be sold, nor the possession of Ingersol disturbed until the expiration of twelve months from its date.

After this answer, the complainant filed an amended bill, in which he makes parties the executors of Watson and the creditors named in the deed to him. In this he charges the deed to be fraudulent, and the debts either wholly simulated or paid. He also sets out the agreement between himself and Ingersol of the 30th August, 1839, and insists that the slaves, though delivered, were not relieved from the incumbrances of McDougald and Watson's deeds of trust. He offers also to deliver the slaves or account for their value in any decree which may be made. He charges that the deed to Watson was made without his knowledge or concurrence, and that none of the creditors assented to the provisions of it, and that the two deeds to McDougald and Watson are void as to him, because the acknowledgment on which they were recorded was made before a person styling himself de-

puty clerk of the county court of Russell county. By a supplemental bill the complainant charges that he obtained judgment against Ingersol on the note last due from him and Underwood at the spring term, 1845, of the circuit court of Russell county, and that it remains unsatisfied.

The answers of the defendants to the amended bill are somewhat lengthy, and so much as is necessary of each, to show the matters alledged in avoidance of the complainant's case may be thus stated.

Ingersol sets up and exhibits an agreement made between himself, McDougald, Watson, and Bailey, as the attorney at law and trustee for the complainant, under date of the 17th February, 1842. In this it is recited, that Ingersol having executed the several deeds of trust, previously referred to, and Bailey having advertised the property thereby conveyed to be sold on the 21st February, it was agreed between the parties, provided the complainant should not object to the agreement by or before the sales day, that all the lands and slaves included in said deeds of trust be sold, on the day and at the place previously mentioned in the agreement, under the deed to Bailey, according to the advertisement of the same—the land first, and the slaves afterwards, upon a credit of twelve months—the purchase money to be received in such manner as the trustees should determine—the slaves Stephen and his wife Esther, and Eveline and her infant child, to be bid off by Watson and conveyed to Wm. J. Ingersol, (a son of the defendant,) without further consideration. The proceeds of the sale of the remainder of the trust property, or the notes for which it should be sold to be appropriated as follows: *First*, to McDougald, \$8,773—*next*, to Watson, \$1,154—*next* \$4,324 to the claim due and owing to A. B. Davis, as the assignee of Seaborn Jones—*lastly*, after the satisfaction of these claims, Bailey, as attorney and trustee for Pinkard, to receive \$6,000. These sums were severally to be discharges of Ingersol from the claims of the parties, and the same result was to follow even if the sums before stated were not produced by the sales. The expenses of sale, including attorney's and sheriff's fees, to be paid by the trustees respectively, in proportion to the sum each should receive from the proceeds, and the sums thus

paid to be refunded to them out of the proceeds of the sale. It was also a stipulation of this agreement, that it should not be considered as releasing Underwood. He also insists that both Watson and McDougald assented to the transfer of the twelve slaves made to the complainant on the 30th August, 1839, though this consent was verbal only.

The answer of McDougald asserts that the debts mentioned in the trust deed to him were *bona fide*, and the deed made by Ingersol at his request, and accepted by him on the day of its date.

The executor of Watson asserts that the deed to Watson was made at the instance of a son and agent of Watson during his absence, but that it received his assent and was accepted by him in a short time after its execution.

Only one of the creditors, Seaborn Jones, asserts an interest under Watson's deed. He insists that he was at the time of its execution a creditor of Ingersol to the amount of \$2,800 over and beyond certain notes for \$4,000, assigned to A. B. Davis previously to the date of the deed, and that Ingersol told him he was secured in all his demands. He claims that the deed shall be considered as a trust for his benefit.

McDougald subsequently filed a cross bill, in which he insists that the property conveyed to him shall be sold under his deed. He also sets up his right as assignee of certain notes which are supposed to be specified in the deed to Watson as due to Seaborn Jones. The debt in that deed is to Seaborn Jones in divers notes and accounts to the amount of \$4,000. McDougald insists that one note for \$3,500, as well as another for \$500, were executed from Ingersol to Jones for the price of a certain tract or tracts of land; that Jones executed a title bond only, and retained the titles in his own name as a security; that those notes were transferred by Jones to one Davis previous to the execution of the deed to Watson, and constituted the debt intended to be secured by it. The cross bill prays that the deed to Watson, if set up, may be declared to extend to these notes, and that otherwise the land purchased, which is part of that conveyed by the different deeds, may be in the first place subjected to the payment of that debt.

By an agreement between the solicitors for McDougald and

Pinkard, the cross bill was to be heard on the evidence taken on the original bill, and considered as if all the allegations were denied by Pinkard. The answer of Ingersol relies on the agreement of the 17th February, 1842, set out in his answer to the amended bill.

The cause was heard upon the original and amended bills, answers, exhibits, testimony, cross bill and answers, when the chancellor decreed the deed to McDougald as valid; that to Watson to be invalid, on the ground that the assent of Watson and the other creditors was not made to appear; retaining the complainant's bill, and directing an account to be taken of the debts secured by it; directing the production by the complainant of the twelve slaves conveyed to him by Ingersol, and that the entire property conveyed should be sold under McDougald's deed; the proceeds of the land purchased from Jones to be first applied to the payment of the notes held by McDougald as the assignee of Jones, and the remainder to go into the general fund, out of which the costs of the suit were first to be paid, then the debt to McDougald, and afterwards the debt to the complainant, as stated in the trust deed to Bailey. All the parties in interest sue out cross writs of error, to reverse this decree.

Pinkard assigns that the court erred: 1. In sustaining the trust deed to McDougald. 2. In establishing and enforcing the agreement between Ingersol and Pinkard of the 30th August, 1839, and in decreeing that Pinkard should return the slaves for the purpose of first satisfying McDougald's deed. 3. In decreeing the debts due on Jones's notes to be paid out of the proceeds of the land for which they were given. 4. Because the decree is uncertain and indefinite in decreeing what should be paid to the complainant after the satisfaction of McDougald's debt.

Ingersol assigns that the court erred: In not sustaining the agreement entered into by him with all the parties, of date the 17th February, 1842.

McDougald assigns that the court erred: 1. In declaring Watson's deed void. 2. In declaring that the notes held by him as assignee of Jones should be paid only out of the special fund to be produced by the sale of the land for which these notes were given.

HEYDENFELDT and W. DOUGHERTY, for the complainant, insisted: 1. That the deeds to Watson and McDougald were void as unregistered deeds; the deputy clerk, to perform a valid act, must act in the name of his principal. [Godbolt v. Pl. and Mer. Bank, 4 Ala. Rep. 516.] 2. The want of assent of the beneficiaries, and the fraud in the debts secured by them to A. Ingersol renders the deed of Watson void. That to McDougald is avoided by his consenting to the fraud in Watson's deed, as both were parts of the same transaction. [Kemp v. Buckey, 7 Ala. Rep. 138; Elmes v. Sutherland, Ib. 262; P. & M. Bank v. Clarke, Ib. 765; Cummings v. McCullough, 5 Ib. 333; Veal v. Bliss, 9 Pick. 13.] 3. The agreement set out by Ingersol, and afterwards introduced in the amended bill, cannot be enforced partially. Its whole object has been defeated, and therefore the complainant has the right to go on his other securities, and the last contract considered as dissolved. [Skillern v. Mays, 4 Cranch, 137; Tucker v. Woods, 12 John. 190.] An incomplete contract, by which one has the option to complete it at a particular time, raises a mutual right of rescision, [Ethridge v. Glover, 5 S. & P. 264; Martin v. Chapman, 6 Porter, 344; Cringan v. Nicholson, 1 H. & M. 428;] and will not be enforced when one alone is bound. [Pratt v. Carroll, 8 Cranch, 471; Pratt v. Law, 9 Ib. 456; Benedict v. Lynch, 1 John. Ch. 370; Hatch v. Cobb, 4 Ib. 559; Morgan v. Morgan, 2 Wheat. 290; Colson v. Thompson, Ib. 336; Brashear v. Grubs, 6 Ib. 528.] When he who is to profit by a contract is the occasion why it is not performed, it is dissolved, [Champion v. Hartshorn, 2 Cowen, 494,] and the acceptance of another security does not extinguish a previous demand. [Johnson v. Johnson, 11 Mass. 359; 5 Mass. 11; 6 Ib. 143; Smith v. Rogers, 17 John. 340.]

J. E. BELSER, for Ingersol, insisted: 1. That McDougald's assent to the deed to himself is clearly established, as well by his answer as by his conduct in proceeding to sell. [Moffat v. Ingraham, 7 Dana, 495.] That to Watson, so far as he and Jones were concerned, was assented to the one by his agent and attorney at the execution, and the other before the complainant filed his bill. This is sufficient to

validate it. [Cunningham v. Freeborn, 11 Wend. 241; Skipwith v. Cunningham, 8 Leigh. 272; Wheeler v. Sumner, 4 Mason, 483; Copeland v. Weed, 8 Greenl. 411; Bryden v. Moore, 11 Pick. 363; Everette v. Wolcott, 15 Ib. 94; Halsey v. Whitney, 4 Mason, 217.] 2. The original vendor of land and his assignee have a lien on it independent of the deeds to either party, therefore if the assent of Jones is established, his entire debt will be paid before that to the complainant can come in. [Haley v. Bennett, 5 Porter, 452; Roper v. McCook, 7 Ala. Rep. 318.] 3. If the deeds of trust to Watson and McDougald are valid, then the complainant must account for the twelve slaves transferred to him, if necessary to satisfy the trusts in those deeds. [Williams v. Burt, 7 Ala. Rep. 907; 4 Porter, 27.] 4. The agreements made between the parties subsequent to the trust deeds should be carried into effect. [Fowler v. Fuller, 6 Mass. 58; Violett v. Patton, 6 Cranch, 142; Townsly v. Sumrall, 2 Pet. 182; Mallory v. Sturgis, 3 Stewart, 95.] 5. Pinkard having received a portion of the property under the new agreement, in which the deeds of trust are referred to, cannot now set them aside and subject the property to the payment of his debts as they stood previously. [McGowan v. Garrard, 2 S. & P. 479; Butler v. O'Brien, 5 Ala. Rep. 322.]

McLESTER, for the defendants, Watson and McDougald, insisted: 1. The probates of the deeds are sufficient to warrant their registration. [Digest, 149, 19; Hobson v. Kismam, 8 Ala. Rep. 357; Kemp v. Buckey, 7 Ib. 141.] 2. So far as the grantees are parties in interest under deeds giving preferences, there can be no stronger evidence of assent than the acceptance of the deed. Such a deed is not within the decision of Elmes v. Sutherland, 7 Ala. Rep. 262. 3. The deed may be fraudulent as to some of the named creditors, but that does not avoid it as to Watson. [Anderson v. Hanks, June Term, 1845; Prince v. Sheppard, 9 Pick. 176; Doe v. Pilcher, 6 Taunt. 369.] 4. The deed to Watson received the assent of Jones, and therefore debts to him are covered by it, but independent of this, the notes of which McDougald is the assignee, are precluded by the implied mortgage in retaining the title.

GOLDTHWAITE, J.—1. The equities of the several parties to this cause will be best ascertained by learning what were the rights of each growing out of the several deeds of trust, and how those which previously existed were thereby controlled. In doing this it will be unnecessary to advert to the point made, that the deeds to McDougald and Watson cannot be regarded as registered, in consequence of there being no proof beyond the acknowledgment of the grantor taken by the deputy clerk. That question was settled by the decision of *Kemp v. Buckey*, 7 Ala. Rep. 138, in the same way as here decided by the chancellor.

2. So far as the validity of the deed to McDougald was dependent on his assent to its provisions, that is clearly made out by his acceptance of the deed when it was executed. His answer to this point of the case is responsive to the bill which calls for a discovery as to this matter, and brings him within the influence of the principle alluded to in *Elmes v. Sutherland*, 7 Ala. Rep. 262, and settled in *Hodge v. Wyatt*, 10 Ib., 271.

3. The validity of the deed to Watson, if dependent on his consent, independent of the other creditors mentioned in it, would be established in the same manner; but the implication arising from this deed is, that the other creditors, as well as Watson, were required to assent to the delay of their several debts until the period stipulated for. There is no term in the deed to warrant the inference that Ingersol intended to secure one, in preference to another of those named, and as the delay of payment is the chief object of the deed, according to the principles declared in the cases just cited, the assent of all the creditors is essential. This is neither asserted nor shown—indeed the assent of some is expressly disproved. So far, then, as the rights of Watson and the other creditor, Jones, insisting on this deed, are based on it, nothing can be claimed.

4. If the cause stood alone on the deeds of trust, the entire property conveyed would be subject in the first place to the payment of the specified debts to McDougald, and the surplus to those due the complainant, but even then the difficulty would exist, whether the acceptance of this security

was not a waiver by the complainant of all of his claim against Ingersol, for the debt due from him and Underwood, which was not provided for by the trust. However doubtful this might have been, as a question of intention between the parties, it is put at rest by the subsequent agreements between the parties, with reference to the trust property, or portions of it. In the agreement between the complainant and Ingersol, under the date of 30th August, '39, it is expressly stipulated that the delivery of twelve slaves at a particular time and place, with security for \$4,000, to be paid at a future day, should extinguish the entire demand, so far as Ingersol was concerned. It is true, this agreement was only partially performed, by delivering the slaves, but it is quite propable the existing deed of trust was then looked to as ample security for the future payment. As to the release by Watson and McDougald, of their lien on the slaves, which the agreement also stipulates for, Ingersol asserts the conveyance of the slaves was virtually assented to by them, and the subsequent agreement between all the parties of the 17th February, '42, goes far to sustain his assertion. In this neither McDougald or Watson assert any claim to these twelve slaves, and it is evident from other parts of the case, they were not then present. They do assert, however, that the sale as advertised by the complainant's trustee, shall take place as advertised by him, and it is scarcely possible he would advertise property for sale which his *cestui que trust* was already in possession of as owner. On the other hand, the agreement provides that *all* the property conveyed by the deeds of trust shall be sold—the lands first, and the slaves afterwards—but notwithstanding the generality of these expressions, it seems highly improbable the parties looked to the sale of the twelve slaves which Ingersol had previously conveyed to the complainant. This view is confirmed, in some degree, from the circumstance that the complainant is postponed as the last creditor to be satisfied, and the surplus remaining after the payment to him of \$6,000, is to be paid to Ingersol—a matter entirely inconsistent with the fact that the complainant was then a creditor—if the slaves are excluded—of more than \$12,000. We are left to grope in the dark, without the aid of allegation or testimony on either side, to explain the

apparent inconsistencies of this agreement, but it is distinctly relied on by Ingersol, in his answers to the amended and cross bills, and the other parties have not thought proper to amend their bills, and thus elicit explanation. They could not therefore complain if such a construction was given to this agreement as would make it consistent with the apparent justice of the case; and if the decree of the chancellor could admit of affirmance on this construction, it would be the one we should give to the agreement. It may be true, that the trustee was not the authorized agent of the complainant, to assent to this compromise, but the agreement appears as an exhibit, and we must presume it was so proved at the hearing, as the decretal entry states the cause as having been heard on the exhibits, as well as answers and proofs. Whatever the true construction of this agreement may be, it seems to us to control the entire cause. All the parties to it, as well as the other person provided for by it, had actual or colorable rights under the several deeds of trust, and the agreement can be considered in no other light than the ascertainment and adjustment between themselves of these rights. It does not appear to have been the fault of Ingersol, that the settlement on this basis did not take place, and therefore he is entitled to have it carried into effect. Neither of the other parties seem to insist on it, though from what has previously been said, it is apparent the only title of Watson to participate in the trust fund, arises out of this agreement. So, too, the title of the assignee of Jones' notes, if resting on the deed only, would be defective, but under the agreement it is perfect.

It will be seen that McDougald, by his cross-bill, asserts, that he is the assignee of these notes, and that a lien upon the land, for which they were given, was retained by the vendor's withholding the legal titles at the time of sale, and transferring an equitable interest only by his title bond. There is no proof of these circumstances, and the facts of this bill are to be considered as denied. It is possible, a reference to the master might dispose of the difficulties in the way of a final decree, growing out of this defect, but as it is possible we may have mistaken the intention of the parties, in their agreement of February, '42, and as that may possi-

bly be modified by the production of the advertisement of the complainant's trustee, which is there referred to, or even the agreement, reformed, if any important matter is omitted by mistake, &c., it would be proper to remand the cause—the reversal of the decree is a necessary consequence of what has been said—in order that further proceedings may be had, not inconsistent with this opinion; and that the agreement of the 17th February, 1842, may be established, and made the basis of the decree—subject, however, to an account and allowance of all payments subsequently made by Ingersol.

Decree reversed and remanded for further proceedings, at the mutual costs of the complainant and McDougald, to be reimbursed from the sales of the property.

BEAVERS AND JEMISON v. SMITH.

1. This court will not permit error to be confessed, upon a power of attorney alledged to be executed by the defendant in error for that purpose, she being a non-resident, and her attorney in this court making affidavit that he believed it was fraudulently obtained; but will leave the parties to seek their redress in the ordinary mode.
2. A citizen does not lose his political rights by residence in a foreign country, nor does the continued residence of a woman in a foreign state, after the death of her husband, authorize the inference that she has become entitled to its political privileges. Whether a citizen of the United States can throw off his allegiance without the consent of his government—*Quere*.
3. The widow is not dowable of a mill, which a purchaser from the husband had erected, the one existing at the time of the sale having been dilapidated, and torn down by the purchaser. Such a case is a proper one for compensation, and a court of chancery can alone afford relief.
4. Where an assignment cannot be made of a portion of the premises, the interest of one-third part of the value of the premises at the time of the alienation, is a just criterion. Where the principal value consists in buildings, requiring an annual outlay to keep them in repair—*Quere*—Is it not just the dowress should contribute her portion of the expense?
5. At law, the widow cannot recover damages, as mesne profits, against a

- purchaser but from the institution of the suit, though the rule is otherwise as against the heir. But in equity, damages are allowed the widow upon the ground of title, and she is entitled to interest upon the arrears.
6. Where a compensation is made in money, the decree should not be for a gross sum, by estimating the supposed present value of the widow's life estate, but for the payment annually of the sum ascertained to be the annual value of the dower interest during the life of the dowress, secured by a *lien* upon the estate, or in some other eligible mode.
7. *Quere*—Where the widow receives a portion as one of the distributees of the estate, may not the court decree compensation, where she is proceeding against a purchaser from the husband with warranty?
8. Where no obstacle is thrown in the widow's way in the recovery of dower, she is not entitled to costs.

Error to the Chancery Court of Talladega.

THE bill was filed by the defendant in error, widow of Benjamin Smith, to obtain dower in certain lands situate in Talladega. The bill alleges the marriage of herself and husband in South Carolina. The removal to this State by her husband, bringing her and the children of the marriage, with him. The settlement in Talladega, and purchase by the husband of certain lands which are described, upon which it is alleged valuable improvements were made, including a water mill, &c. That on the 6th March, 1834, the said Benjamin sold the said land to Major Beavers for \$4500, and executed to him a deed therefor. That in 1834, her husband conveyed a parcel of the tract to one Edward Prince, who afterwards sold, and conveyed the same to Robert Jemison. That in 1836, Beavers sold and conveyed to Jemison a portion of the lands for \$5000. That her husband has departed this life about six years before the filing of the bill, without making any provision for her by will, having died intestate. That she never relinquished her dower in the lands sold by her husband. The prayer of the bill is for an admeasurement of dower, for general relief, &c.

The defendants Beavers and Jemison, answered the bill, denying all knowledge of the marriage of the complainant with Benjamin Smith, and requiring proof of the fact. They admit that he brought with him to Talladega the complainant, or a woman of her name, with whom he lived. That he removed to Texas in the year 1834, carrying her and the

rest of his family with him, and that he died there in 1836, the complainant still residing there. They admit the purchase of the land describe in the bill, but insist that to certain portions thereof Benjamin Smith had no title, either at law or in equity, and set out, and describe an eighty acre, and a forty acre tract, as being in this condition; the last tract being the one described in the bill as having been conveyed to Edward Prince.

They admit the sale from Beavers to Jemison, and also admit that when the land was purchased by Beavers from complainant's husband, there was upon it a grist and saw mill, but not of much value. That they were almost in a state of dilapidation when Beavers sold the land to Jemison; and that he shortly after pulled them down, and erected valuable improvements, costing him near \$20,000. The dwelling house was scarcely habitable, and in their opinion would not have rented for more than \$100. It is admitted that Jemison rented them one year for \$500, but shortly after they became almost entirely valueless. That before Jemison proceeded to make his improvements on the land, he had an assurance from complainant, conveyed through her brother, that she never intended to claim her dower.

They also insist, that as the complainant has continued to reside in the Republic of Texas, since the decease of her husband, she is an alien, and cannot recover her dower. They also rely upon the statute of limitations of six years, as a bar to a recovery. They also demur to the bill.

They also filed a cross bill, which was dismissed by the chancellor, and upon which no question is made in this court.

Much testimony was taken, which is sufficiently noticed so far as it is important, in the opinion of the court.

The chancellor, after disposing of certain objections to the testimony, proceeded to determine, that the complainant was entitled to dower in all the lands, except the eighty, and the forty acre tracts described in the answer of the defendants. That of the residue of the lands, the complainant was not dowable by metes and bounds—that she was dowable of the value of the lands at the time of the alienation, and was not dowable of the improvements put upon the lands since; but that the value of the dower ought to be estimated in money, and assign-

ed to her in that form, and that she was entitled to dower in the net annual rents and profits, only from the time of filing the bill. A reference was made to an auditor, to state an account of rents and profits, and the value in money of the complainant's dower interest during the remainder of her life. The auditor reported the dower interest, at the date of his report, to be \$750 40.

To this report both parties excepted, and the chancellor set it aside, and settled the following principles for the government of the auditor :

That the demandant was entitled to an account of rents and profits, from the time of filing the bill, up to the date of the decree, and in addition a gross sum equal to the value of her estate.

That the land was to be estimated at its value at the time of the alienation. That leaving out the Prince tract, which was no part of Beavers' purchase, the tract as sold consisted of two hundred and forty acres, of which she was dowerable of one hundred and sixty acres, or two thirds of the whole, which was worth \$4,500, that consequently \$3,000 was the sum out of which dower was to be carved.

He also considered that the interest of one third the value of the land, at the time of the alienation, was a proper allotment in lieu of the land itself, during the life of the demandant, and that she being forty-five years of age, of good constitution, healthy and robust, might be presumed to live seven years.

From these principles the auditor stated the following report :

Sum of which the complainant is dowerable, \$3,000.	
Legal interest on one third of that sum, for seven	
years, is.....	\$560 00
Legal interest from the time filing the bill, 2 years,	
3 mo's, 20 days,	103 28
	<hr/>
	\$663 28

Which was confirmed by the chancellor.

The assignments of error are—1. The overruling the objections to the testimony of defendant in error.

2. In the interlocutory decree made.

3. In overruling the exceptions to the report of the auditor.
4. In the final decree rendered.

At the trial term of the cause, in this court, the plaintiffs in error produced a paper purporting to be a power from Catherine Smith, to confess error, and a confession of errors by the attorney in fact, but it being suggested to the court, that the power had been fraudulently obtained, a rule was made, requiring the defendant, Catharine Smith, to show cause at the next term of the court, why judgment should not be rendered in favor of plaintiffs by confession of errors.

At the succeeding term of the court, the due execution of the power of attorney was proved by affidavit.

Upon the other hand, it was shown by the affidavits of sundry persons, that a large portion of the decree had been transferred by David Conner, the attorney in fact of the defendant, before the execution of the power.

The counsel for the defendant made affidavit, that from information and belief, he stated that any release, or discharge of said decree, or revocation of said power of attorney, obtained from the defendants, by the plaintiffs or their agent, was obtained without consideration, and by fraudulent misrepresentations, or fraudulent concealment of facts, and without any notice to the parties, to the payment of whose debts the said decree had been dedicated, by the duly authorized agent of the defendant. It further appeared that the defendant was a resident of Texas.

The court directed the preliminary motion, and the merits, to be argued at the same time.

CHILTON, for the plaintiff in error. 1. The demandant when she exhibited her bill was an alien, and therefore not dowable. [Shanks v. Dupont, 3 Peters' Rep. 248; Kelly v. Harrison, 2 Johns. Cas. 29; Congregational Church at Mobile v. Morris, 8 Ala. Rep. 182; Coke on Lit. 31.] Expatriation may be considered a practical and fundamental doctrine of America;—American history, American institutions, and American legislation all recognise it. [Alsberry v. Hawkins, 9 Dana, 178; Moore v. Tisdale, 5 B. Mon. 352.] It is the law of nature, and of nature's God, pointing to the wide world, where to choose our place of rest, and Providence our

guide. Her removal to Texas with her husband in 1834, and permanent residence in that country ever since, and her declared intention to remain, authorizes the presumption that she has become an alien *de jure*, as well as *de facto*. [2 Hein. B. 2, C. 10, p. 220; ib. 181.]

2. But if dowable, as the proof shows she is administrator of her husband's estate, who has conveyed the lands with full covenants of warranty to defendants, she is liable to refund what she may recover. The court should set off one demand against the other under the peculiar circumstances of the case. [2 Story's Eq. 664.] Or hold her recovery as a fund for their indemnity. [Pharr & Beck v. Reynolds, 3 Ala. Rep. 521.] ●

3. The statute gives no authority for allotting a monied compensation instead of dower. [Clay's Dig. 172, § 3.] And the cases where it has been done are either founded on statutes, or upon the consent of the parties. [Hale v. James, 6 Johns. C. Rep. 262; see Langdon v. Stephens, 6 Ala. R. 730, as to equitable dower.]

4. But if such compensation were allowed, the court erred in assuming seven years as the demandant's life, and giving her interest for that period, on one third of the value of the premises at the time of alienation by her husband. [Herbert et al. v. Wren, et al. 7 Cran. 380.]

Notwithstanding the conflict of the authorities on this subject, the sensible rule seems to be, that she is dowable in the lands *according to their value at the time of allotment, excluding the improvements made by the defendants.*

See an able review of all the authorities, by Story, in Powell and wife v. Monson & Brimfield Manufacturing Co. 3 Mason's C. C. Rep. 347, and authorities there cited.

5. Damages should not have been given.

6. Nor the cost imposed on the defendants below.

S. F. RICE and T. D. CLARKE, for defendant in error, made the following points:

1. The assignment of errors by the plaintiffs in error, is a waiver of their right to insist on the rule for a confession of errors.

2. the instruments of writing relied on as sustaining their motion for a confession of errors, cannot be noticed by this court, because their execution is not duly proved—their fairness is impeached—they are no part of the record. [Britt v. Burk, 7 Ala. R. 588.]

3. The said instruments cannot authorize a reversal of the decree, because they are fraudulent—they are made to parties who had no notice, and *since* a sale of a large portion of the decree, by the duly authorized attorney of Mrs. Smith, to innocent and *bona fide* purchasers—they are also in fraud of the lien of the solicitors of Mrs. Smith, upon the decree, for their fees. [Greenleaf's Ev. 203, § 172; Haden, et al. v. Walker, 5 Ala. R. 86; Braham & Atwood v. Ragland, 3 S. 247; Tipton v. Nance, 4 Ala. R. 194, (Attorney's Lien.) See Bradt v. Coon, 4 Cowen, 416; Pindar v. Morris, 3 Cai. R. 165; The People v. New York C. P. 13 Wend. 649; Hutchinson v. Buchanan, et al. 15 Vt. R. 544.]

4. A woman who was born and raised in South Carolina, and there married to a citizen of the United States, and then settled with her husband in Alabama, and resided there for several years, and until 1834, and then with her husband removed to, and resided in Texas, until the death of her husband, in July, 1836, and since his death has continued to reside in Texas; *is not an alien*. [Lynch v. Clarke, et al. 1 Sandford's Ch. R. 583, 657; Shanks, et al. v. Dupont, et al. 3 Peters' R. 242; Story's Confl. of Laws; 48, (*revival of native domicil*;) ib. 22, 23, (*Double allegiance—natural and local*;) 2 Kent's Com. 50, 64, (*citizen—alien—naturalization*.)]

5. A woman, born, and raised, and married, in the United States, to a citizen thereof, and taken by her husband from her home in Alabama to Texas, in 1834, and there remaining with her husband until his death, and after his death, is entitled to dower in the lands of her husband in Alabama—and may recover such dower, whether she be called alien or citizen. [Allen v. Allen's adm'r. 4 Ala. R. 556; Jinkins v. Noel, 3 Stew. 60; Silliman v. Cummins, 13 Ohio R. 116; Jackson v. Lunn, 3 Johns. C. 109; Scanlan v. Turner, 1 Bailey's R. 421; Story's Confl. of Laws, 128, 129; ib. 453,

454; 4 Kent's Com. 36; Priest, et al. v. Cummings, 16 Wend. 617.]

6. Where land is aliened by the husband, the widow's dower is to be taken according to the value of the land, at the time of the alienation; and "this rule is the most favorable to the purchaser." [Hale v. James, 6 Johns. Ch. Rep. 258.]

7. In all cases like this, where dower cannot be assigned by "metes and bounds," (because the chief value of the land is owing to a mill and mill seat thereon, and the mill and mill seat are not divisible,) the circuit and county courts cannot exercise the jurisdiction conferred on them by our statute. [Clay's Dig. 173, § 5.] And as the chancery court cannot assign the dower by metes and bounds, a pecuniary compensation must be allowed in lieu of dower. And this too, is most favorable to the purchaser. [Wright v. Jennings, 1 Bailey's R. 277; Stoughton v. Leigh, 1 Taunt. 402; Billings v. Taylor, 10 Pick. R. 460.]

"Where a literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose, or *cy pres*." This said of charities, but it applies to other things, and to dower. [2 Story's Eq. 415, § 1169, *et seq.*]

8. *Mere residence* in Texas could not destroy the duty of natural allegiance as to the husband. A *renunciation* of his native allegiance, and the oath of allegiance to the foreign country, are essential to make him a citizen of the foreign country. The *native* allegiance remains, even if that oath is taken. If not taken, the case is much stronger. These views apply with greater force to the wife.

If the right of *expatriation* is conceded, then it is clear, that *expatriation* does not, *ipso facto*, work a *confiscation* of the vested civil rights of a wife to dower. *Expatriation* is not *confiscation*—nor does it annihilate vested civil rights, the rights to property in the native country.

9. *Mere non-residence* is not *expatriation*.

10. The character of citizen is not lost in the native country, until the naturalization laws of the foreign country are invoked or complied with. And there is no proof that Smith or his wife ever did take any steps to become citizens of

Texas, except that they resided there. And this is not sufficient.

11. The naturalization of the husband does not, *per se*, naturalize the wife. [Priest, et al. v. Cummings, 16 Wend. 617; Shanks v. Dupont, 3 Peters, 242, last head note.]

12. The statute of limitations does not apply to dower. [Jones v. Powell, 6 Johns. Ch. R. 194.]

13. A married woman can only be divested, during coverture, of her interest in her husband's lands, in the manner pointed out by statute. [Silliman v. Cumming, 13 Ohio R. 116.]

14. Claims to dower are paramount to those of creditors. [Thayer v. Thayer, 14 Vt. R. 117; Allen v. Allen, 4 Ala. R. 556.]

ORMOND, J.—Although this court has appellate jurisdiction only, it may nevertheless restrain the action of its suitors, upon facts ascertained, and made known to it, from the general power vested in all courts, of preventing the abuse of its process, and of the means provided for the administration of justice. The cases of Hall v. Hrabrowski, 9 Ala. 278, and Bradford v. Bush, at the last term, are instances of the exercise of this power.

But this court can only act in such cases where the fact is admitted, or where its truth is inferrible from its not being denied. Having no original jurisdiction, it cannot ascertain the existence of a disputed fact *in pais*.

Here, the plaintiff in error having made a *prima facie* case, by the production of a power of attorney from the defendant in error, to confess error, and the confession of error founded on the power, a rule was granted upon the defendant in error, to show cause why error should not be confessed. The defendant being a non-resident, her attorney in this court controverts the *bona fides* of the act, and makes affidavit, that he believes the power of attorney to confess errors, was fraudulently obtained from his client. In addition, it appears that before the power to confess errors was given, the authorized agent of the defendant in error, had transferred to third persons the principal part of the judgment. Under these circumstances we do not think this a proper case, for the in-

terposition of the extraordinary power of this court, which can only be properly exercised when the facts upon which its action is based, is either admitted or not denied, and when its action cannot by possibility prejudice the rights of any one. In all doubtful cases, the party complaining must be left to that relief, which the law has otherwise provided for the redress of all injuries.

The question whether the complainant is debarred from asserting her right to dower in the lands of her deceased husband, in consequence of her removal with him to Texas, in 1834, and remaining there since his death, which took place in 1836, and having thereby, as is insisted, become an *alien* to this country, is one of great interest. As it respects the right of expatriation, insisted on by the plaintiff's counsel, without the consent of the government, it would seem to follow necessarily from our naturalization laws, that our people can migrate and transfer their allegiance at their pleasure, to a foreign government; as our laws do not require the consent of the former sovereign, to the expatriation of a foreigner, as a condition of his becoming a citizen of the United States. The well known rule of the common law, that a natural born subject cannot divest himself of his allegiance to his sovereign, appears to have been considered as the true rule in the United States, in *Ainslie v. Martin*, 9 Mass. 461. In the case of the *Santisma Trinidad*, 7 Wheaton, 283, the question came before the Supreme Court of the United States, and it is put as a *quere*, whether an American citizen can throw off his allegiance to his native country, independent of any legislative act authorizing him to do so. This interesting question must therefore, in this country, be considered as unsettled.

Nor is it necessary it should be settled in this case, for conceding the right of expatriation as it is called, to be as contended for, it is very certain that the mere removal of a citizen of the United States, to a foreign country, does not work a forfeiture of his political privileges, as a citizen of the United States. He may, by the removal, owe a local, temporary allegiance to the sovereign of his domicile, but neither in England, or the United States would a sojourn of any length of time, entitle such resident to the political rights of

a natural born subject, or citizen. In England he could only acquire such a right by act of parliament, and in this country, by doing the acts enjoined by the naturalization laws. Until these are done, he is regarded by the laws of both countries as an alien.

We need not stop to inquire, what would have been the effect on the wife, of the husband's renouncing his allegiance to the United States during the coverture, and becoming a citizen of Texas, because it does not appear that the husband ever became entitled to the political privileges of a citizen of that Republic. Nor does it appear, that the complainant since his death has become a citizen of that State, and entitled to its political rights; yet this was a fact which the defendants put in issue, and were bound to establish. We cannot infer that such is the fact, from her continued residence there, since her husband's death, although such an inference seems to have been drawn by the Supreme Court of Kentucky in *Alsberry v. Hawkins*, 9 Dana, 178.

Her residence there, is entirely consistent with the retention of her political rights derived from her birth in South Carolina, and until some further act is shown, inconsistent with the future assertion of this right, it appears to us illogical, and unwarrantable, to deduce such an inference from an act so equivocal as residence merely. This inquiry would seem to be of small importance in this cause, as the Republic of Texas has become an integral part of the United States whilst this cause has been in progress, and all its citizens have become citizens of the United States. If, then, there had been a temporary suspension of the right to sue, has it not been restored by the annexation of that State to the Union?

The question of what the widow shall be endowed, whether of the value of the land at the time of the alienation, or of the enhanced value at the time of the assignment, arising from improvements by the *alienee* in the erection of a mill, &c. was fully considered by us in the case of *Barney v. Frowner and wife*, at the last term, when it was held, that she was not dowable of such improved value. It was also held, that the statute remedy for the admeasurement of dower, was confined to those cases where an assignment could be

made by metes and bounds, and where that was impossible, and it was necessary to make a compensation in money, resort must be had to a court of chancery. It is said in the old books, that where a mill is subject to dower, the widow may be endowed of the third toll dish. [Coke Litt. 32;a Thomas Coke, 671.] That was impossible in this case, because the mill, which existed at the time of the alienation by the husband, becoming dilapidated, was torn down by the alienee, and a much more valuable, and more costly structure erected in its stead, which it would be obviously unjust to endow the widow of; it was therefore a proper case for compensation, and a court of equity could alone afford the proper relief.

No question was made in the case as to the appreciation in value of the property, from any other cause than the improvements made by the purchaser, the true rule was therefore adopted by the chancellor—the value at the time of the alienation, and having ascertained that, he decreed her the interest on one-third part of such value from the time of the filing of the bill.

At common law, where an assignment could not be made of the thing itself, the widow was dowable in a special manner. Thus, although she was dowable of the third toll dish of a mill, the sheriff might assign her a third part of the profits—a third part of the profits of a fair, of an office, of a park, of a dove cote, &c. [Coke Lit. 32,a.] So also of mines, where an assignment of the mine was impracticable, of the third part of the profits. [Stoughton v. Leigh, 1 Taunton, 402.]

In this case there is no means of ascertaining what would have been the profits of the old mill, if it had remained, and which would have necessarily fluctuated from the operation of temporary causes, and we cannot conceive of a better criterion than that adopted by the chancellor—the interest of one-third of the value of the premises at the time of the alienation. This is fair and just to both parties, and in any series of years, would be found, we apprehend, to be as often above, as below the actual nett profits. This rule was adopted by Chancellor Kent in *Hall v. James*, 6 Johns. C. 258. This rule, it is urged by counsel, was agreed on by consent in that case, but that is a mistake. The consent was to receive an

adequate sum of money, instead of an assignment of the portion of the premises, and the chancellor determined as matter of law by what rule it should be ascertained.

In a case where the principal value of the premises consists of buildings, requiring an annual outlay to keep them in repair, and prevent their destruction, it is but just that the dowress should contribute her proportion of the expense, as she must have borne it herself, if an assignment, had been made of the thing itself. [See the case last cited.] These remarks are peculiarly apposite when applied to a mill, but no such question appears to have been made in the court below, and was not here.

It is further objected, that damages should not have been given. Damages are properly the mesne profits, arising after the death of the husband, and before the suit for dower. These were not allowed at common law, but were given to the widow by the statute of Merton. In this case the chancellor has properly restricted the widow in the recovery of profits, to the time of the institution of the suit, the defendant being a purchaser. As against the heir, the rule, would have been different; and damages would have been recoverable from the death of her husband. But whatever may be the rule at law, in equity the established doctrine is to allow the widow the mesne profits as damages; and this not by analogy to the allowance of damages under the statute of Merton, but on the ground of title. This is decisively settled in the leading case of *Curtis v. Curtis*, 2 Brown's C. 619.

The chancellor also allowed interest upon the arrears and up to the time of the decree, and this, in our opinion, was strictly correct. The general rule of the English chancery, is not to allow interest upon arrears of annuities, except in peculiar cases, [*Anderson v. Dwyer*, 1 Sch. & Lef. 303,] and this Mr. Roper states, is the rule of that court upon arrears of dower, though he admits he has found no case going that length, and argues to show that the rule should be otherwise. [1 Rop. on H. and W. 457.] We apprehend, however, that this rule applies in no case to arrears, which have accrued pending the suit, and even in regard to annuities, where they are given for maintenance, the rule is otherwise in England, and interest on the arrears is allowed. [New-

man v. Auling, 3 Atk. 579.] That appears to be the principle of this case, as the widow's dower is intended for her sustenance, and we think interest was properly allowed on the arrears.

The master, in ascertaining the value of the dower interest, instead of estimating one-third of the value of the profits, at the time of the alienation, determined the gross value of the dower at the time of the decree, by assuming the duration of the life of the widow to be seven years. By what data or upon what rule of law, this period was assumed in preference to any other, we are not informed. We are aware that from the bills of mortality in England, and other places, tables have been constructed, by which the average duration of human life, at all ages, has been ascertained. These tables form the bases of assurances upon lives, and furnish the means of ascertaining the present value of annuities; but, conceding that the calculations from these tables apply to this climate, and country, we are not able to perceive, on what principle they can be considered proper to be adopted as rules of law. The dowress may live to a patriarchal age, she may die the next day, and the assumption that she will live seven years, is alike unjust to her and the *alienee*. The dowress has but a life estate, where lands are assigned to her, and when from the necessity of the case, instead of the use of the land, she receives money, it should partake of the same qualities—the annual value of the portion which would have been assigned her, had it been practicable to do so. If the parties agree to a gross sum, as the value of the life interest, the court would of course give effect to it. In the absence of such an agreement, the decree must be for the payment of the arrears with interest, and for the payment annually thereafter during the life of the dowress, of the sum ascertained to be the annual value of her dower interest. This it would be the duty of the court to secure to her, by a *lien* on the property, or in some other eligible mode.

In *Hazen v. Thurlow*, 4 Johns. C. 605, a reference was made to the master to ascertain the gross value of the dower interest, but it also appears that the money was deposited in court, subject to the claim of dower, and that she elected to

take a gross sum, and as no opposition was made to the reference, it must be understood to have been assented to.

In South Carolina, it appears, that one-sixth part of the fee simple value of the estate, has been settled, as the proper rule in those cases, where a compensation is made in money, except in cases of extreme youth, or old age. [Heyward v. Cuthbert, 1 McCord, 386 ; Wright v. Jennings, 1 Baily, 277.] But this is not put upon any general rule of law, but appears to depend upon a statute of that State, which gives the power to commissioners, to assess a sum of money in *lieu* of dower, where the land cannot be equally and fairly divided.

We have been able to find no traces in the English books, of any such rule as was adopted by the court here, or indeed of any rule to ascertain the present value in gross, of the dower interest. In *Hobey v. Hobey*, 1 Vernon, 218, a bill was filed by the dowress for a re-assignment of dower, charging the assignment of the sheriff to be fraudulent, there being a coal mine on the land of which she was not endowed. The court proposed to the parties, that she should take £300 per annum, or that she should work all the coal lands, and take a third penny therefrom of the clear profits ; or that a new writ should issue to the sheriff. She elected to take the third penny, and no opposition being made, it was accordingly decreed, which very conclusively shows, that no assignment of dower, except that of common right, can be made but by consent of the parties.

These principles were affirmed in the case of *Herbert v. Wren and wife*, 7 Cranch, 370, where it was held, that a sum in gross, in *lieu* of dower, could not be decreed but by the consent of the parties ; and that there was no legal authority ; for estimating the life of the dowress at seven years, but that the interest on one-third part of the purchase money should be set apart for the dowress, during her life.

It is further urged, that as the husband conveyed with covenant of warranty, the dowress is liable to refund what she may recover from the portion she would receive as one of the distributees of the estate. It is perhaps a sufficient answer to this argument, that if it be admitted the court could thus decree compensation, it should have been put in issue by a cross bill. But neither the answer, nor the informal pa-

per called a cross bill, contains any allegation upon this subject; the evidence therefore which was adduced was wholly irrelevant; and if it could be looked to, does not show what her distributive share of the estate is, or whether there is any thing to distribute.

It remains but to consider the question of costs. The rule appears to be settled, both in England and the United States, that where no impediment is thrown in the way, the dowress is not entitled to costs. [Hale v. James, 6 John. Ch. 264; Morgan v. Ryder, 1 Ves. & B. 20.] Here the widow's right has been resisted, she is therefore, on recovering her dower, entitled to costs. The costs of this court must be taxed against her.

Let the decree be reversed, and the cause remanded for further proceedings.

CLEMENTS, BY HER NEXT FRIEND, &C., v. MOORE.

1. In an action by a female plaintiff upon a breach of promise to marry without reference to time, an allegation that the defendant had married another woman previous to the institution of the suit, is equivalent to an averment that the plaintiff had offered to marry him and her proposal was rejected; or rather is a substitute for it.
2. Where the contract was to marry in a reasonable time, it is sufficient for the female suing for a breach to alledge her readiness to marry the defendant, that a reasonable time had elapsed, the defendant's failure to marry her, and his continued neglect and refusal to do so.

Writ of error to the Circuit Court of Tuscaloosa.

THIS was an action of assumpsit at the suit of the plaintiff in error. The declaration contains several counts, the first of which alleges the mutual promise of the plaintiff and defendant to marry each other, with an averment that the plaintiff is still sole and unmarried, and ready and willing to perform her promise, but the defendant has married another woman, &c. The second count alleges mutual promises to

marry in a reasonable time, that a reasonable time has elapsed, and the plaintiff has remained and still is sole and unmarried, yet the defendant has failed and still refuses to perform his promise. A demurrer was interposed to each of the counts, which being sustained, and the plaintiff declining to amend her declaration, judgment was rendered for the defendant.

E. W. PECK and L. CLARK, for the plaintiff in error. The first count is good, because it avers the defendant has married another woman. No objection was made in the circuit court, to the second count, and it is believed to be unquestionably good. [2 Chit. Pl. 126-7-8.]

B. F. PORTER and S. H. BRODIE for the defendant, contended that all the counts are defective in not alledging a time or place for the marriage to be consummated, or an offer by the plaintiff to marry. It was not sufficient that she was ready and willing—[1 Chit. Pl. 363; 2 Bibb's Rep. 341; 1 Lit. R. 234;] besides the breach in the first count is not good.

COLLIER, C. J.—Conceding that in an action for a breach of a promise to marry a female plaintiff without reference to time, she should alledge in her declaration an offer to marry the defendant, and still we think the first count is good. It alledges that the defendant had married another woman. This certainly excused the plaintiff from reminding him of their engagement, and again offering him her hand. He had placed himself in such a condition as made it impossible for him to accept such a proposal, and the law did not impose upon her the indelicate task, in order to impair the wrong she had suffered, of proposing that which the defendant was under the necessity of rejecting. The allegation then, excuses an offer by the plaintiff to perform her promise, and is quite equivalent to it.

In Johnston vs. Caulkins, 1 Johns. Cas. 116, which was an action for a breach of promise of marriage, it was held that where the defendant had absconded, and thus put it out of the plaintiff's power to offer to consummate the contract, she was excused from making the offer.

The second count is alike unexceptionable. It states a

promise to marry in a reasonable time, the plaintiff's readiness to marry the defendant, that a reasonable time has elapsed, and the defendant's failure to marry her, and his continued neglect and refusal to do so. .

Both counts substantially conform to the precedents in 2 Chitty, and certainly the cases cited by the defendant's counsel from the Kentucky Reports, do not oppose, but so far as applicable, sustain our views. The judgment is reversed, and the cause remanded.

LANG, ET AL. V. PETTUS.

1. Where slaves are left by will to minor children, the executor is not discharged by delivering them to the children's father, but is accountable on their attaining majority, if the slaves are removed from the State and converted.
2. The court of chancery has power to appoint the father guardian of his child's estate, and after giving the requisite security, he may receive a personal legacy coming to his infant child.

Writ of Error to the Orphans' Court of Madison.

THE case made by the record is this: Some time in the year 1827, Nancy Graves died in Madison county, having made a will, which was there afterwards admitted to probate, and the defendant, Pettus, named and qualified as executor. By this will, the testatrix gave to the petitioners, by the name of the children and heirs of Susan Lang, certain slaves, which came to the possession of the defendant as executor. The object of the petition is to compel the executor to deliver the slaves to the petitioners. The defendant, in answer to the petitioner's claim, set up that he delivered the slaves coming to them under the will of the testatrix, to their father, in the year 1830, the petitioners then being minors.

The proof at the hearing of the petition, showed that certain slaves were given by the will of Nancy Graves, to the petitioners, by the description of the heirs of Susannah Lang, deceased, came to the defendant's possession, as executor, and that he delivered them over to John Lang, sometime in the year 1830, by whom the slaves were carried without the State, and afterwards disposed of. John Lang was the father of the petitioners, who then were minors.

Under this state of proof, the orphans' court considered the delivery of the slaves by the executor, as a discharge of his duty, and dismissed the petition.

This is now assigned as error.

ROBINSON, for the plaintiff in error, argued, that the father, as natural guardian of his children, had no authority to receive the legacy of his infant children, and consequently, a delivery to him was no discharge for the executor. [Isaacs v. Boyd, 5 Porter, 388; Chappel v. McMullen, 8 ib. 198; Garrett v. Talmadge, 1 John. Ch. 3; Merrill v. Dickey, ib. 153; Williams v. Storrs, 6 ib. 353; Miles v. Bayden, 3 Pick. 213; Hyde v. Stone, 7 Wend. 354; Kline v. Beebee, 6 Con. 494; Fonda v. Van Horne, 15 Wend. 631; Dailey v. Tolferry, 1 P. Wms. 285; Rotherham v. Fanshawe, 3 Atk. 629; Cooper v. Thornton, 3 Bro. Ch. 96.]

The father's claim to guardianship may be even set aside by the orphans' court, which is invested with the general authority to appoint guardians for all minors. [Huie v. Nixon, 6 Porter, 77.] If the subsequent decision in Hall v. Lay, 2 Ala. Rep. 529, which holds that no guardian can be appointed by the orphans' court, when the father is living, can be sustained, it is not an authority to warrant the delivery by a trustee, of the minor's personal legacy to the father. What is said there on this point is a *dictum*; nor did the question arise in Wood v. Wood, 3 Ala. Rep. 756, where the previous case is referred to as settling the point.

No counsel appeared for the executor.

GOLDTHWAITE, J.—1. The precise question in this cause is, whether, when a bequest of slaves is made to a mi-

nor, the executor will be discharged by a delivery of them to the father of the minor. We think it a mistake to suppose this point has been decided affirmatively by this court, though there certainly are *dicta*, which, without explanation, may have the effect to mislead the profession, as they doubtless did the orphans' court in this instance.

The point of decision in *Hall v. Lay*, 2 Ala. Rep. 529, was the validity of an appointment *by the orphans' court* of a guardian to a minor whose *father was living*. We held the appointment invalid, on the ground that the father was guardian by nature of his child, and because *that court*, neither by the common or statute law, was invested with power to appoint guardians for minors so conditioned. In illustrating the position then assumed, we said, "we cannot doubt there was a period once known to the common law, when the father had the right to the custody and control of his child's estate, in the same manner as he now has of his person." After citing some authorities to sustain this assertion, as well as others which seem to maintain an opposite doctrine, we advert to recent decisions of the English courts of law, which recognize the authority of the parent, as guardian, to control the real estate of the child, by either leasing it or occupying it, at pleasure. None of these matters were then however determined, and we expressly state it to be our intention not then to examine how far the doctrine, that the father has no control over his child's estate, is correct—or when it arose and was engrafted on our law, if indeed it was so. We also added, "it will probably be found to be sustained mainly on the fact, that a court of equity will sometimes interpose its aid to prevent the personal estate of the infant from being squandered, and require the father to give security to have it forthcoming when the child becomes of age, but that even in such cases, he is never deprived of the custody of the estate, if willing to give the requisite security."

In the subsequent case of *Wood v. Wood*, 3 Ala. Rep. 756, we fell into the mistake of stating the previous decision as settling the right of the father to the control and possession of his child's personal estate during minority, and warranting the delivery by an executor, of a personal legacy be-

queathed to an infant. The mistake, at the time, was unimportant to the conclusion arrived at in that particular case, and is only necessary now to be adverted to for the purpose of reconciling the conflict, which, without this explanation, would seem to arise between that decision and *Boyd v. Isaacs*, 5 Porter, 388, where it is decided, that a father, although the *prochein amy* to a suit for his child, could not, either in that quality or as his natural guardian, release or compromise the suit. Having thus disposed of the supposition, that the question is concluded adversely to the claim of the petitioners, we shall proceed to discuss it.

It is not the least curious matter connected with legal science, that the most eminent judges and lawyers of England should have found the relations of parent and child involved in such obscurity that it was a matter of profound difficulty as late as the close of the last century, to ascertain the foundation of chancery jurisdiction over the persons and estates of minors, where fathers were living. It was then, however, firmly established, though even there is exercised only in peculiar cases. [*Butler v. Freeman*, Amb. 301; *Cruise v. Hunter*, 2 Cox, 242; *Ex parte Warren*, 4 Bro. Ch. 101; *DeManneville v. DeManneville*, 10 Vesey, 52; Hargrove's note 70 on Coke Litt. 89, a; 2 Fonb. 224.] With the exercise of this jurisdiction we have no concern at present, beyond the precise question before us.

We endeavored, in *Hall v. Lay*, 2 Ala. Rep. 529, to show there was once a period of the common law when the father was invested with the control of the entire estate of his child during minority, whether that estate was real or personal. In the earlier ages of the English government, when personal property was unimportant as compared with landed estates, and the statutes of distributions and wills had not been passed, the personal property which a child could acquire called for no change in the general law, but so soon as the ordinary was compelled to distribute to the next of kin, and the wills of decedents were enforced by law, we might naturally expect that some mode would be devised to prevent the portion willed or distributable to an infant, from being squandered by his father or guardian. It is far from being clear that the ecclesiastical courts at that day did not

assert the right to appoint a *curator* for the personal estate which came to an infant through the medium of these courts, and it is quite probable it was lost in the continued assaults made on these courts, both by those of common law and chancery, from the time of the English Reformation down even to the last century. In a note by Mr. Thomas to his edition of Coke on Littleton, this subject is traced with much apparent accuracy through adjudged cases reported by Keble, Fitzgibbon and Levinz, as well as Dr. Swinburn's Essay on Wills. The latter claims jurisdiction for the ordinary to appoint a guardian for the personal estate when there was no other guardian by tenure or otherwise. In a case in prohibition as late as Lord Hale's time, he admitted the jurisdiction of the ordinary to appoint a *curator* for the personal estate. In another case, soon after his death, the claim was allowed so far as the infant's *portion*, but was denied as to his *person*. Sometime afterwards the claim was made broader, so as to appoint a guardian in all cases of wills for the *person and portion* whenever the infant was not in wardship by reason of some tenure. [See Thomas' Coke, 160.] If the jurisdiction, either general or limited, was afterwards exercised, it must have been unknown to Lord Hardwick, for in the case of *Burk v. Draper*, 3 Atk. 631, determined in 1746, he expresses great astonishment that the ecclesiastical courts should assume such a power, and recommended to the Attorney General to consider whether he ought not to proceed against the judge by *quo warranto*.

It is very evident the power to require such security from the father or any other common law guardian was proper to exist somewhere, and if not exercised by the ecclesiastical courts, the court of chancery was slow in taking the jurisdiction. The first case in the books is *Holloway v. Collins*, 1 Chan. Ca. 245, in 1674. The assertion of such a power for his court seems to have surprised the then Lord Keeper, for he at first denied the relief, when a legacy of £125 had been paid by the executor to the father, but afterwards granted it on learning the executor had protected himself by a bond of indemnity. The next case—*Dagley v. Tolferry*, 1 P. Wms. 285—was in 1715; there the payment was held bad, al-

though the circumstance was flung in, that the testator on his death-bed had virtually directed the payment to be made to the father. Lord Hardwick, in *Philips v. Paget*, 2 Atk. 80, decided in 1740, considered the last case as improperly ruled, and sustained a payment made to the father, on the ground in his case that the executor was compelled to pay the legacy within a given period, or forfeit some right under the will; but in *Rotherham v. Fanshaw*, 3 Atk. 627, some six years afterwards, the same judge conceded his court would allow an injunction, to restrain a father from suing in the ecclesiastical courts for his child's legacy. It was not until Lord Thurlow's time that the rule was finally settled in *Cooper v. Thornton*, 3 Bro. Ch. 96, 186. Since this, it seems not to have been questioned in England, and has been universally adopted in this country, as may be seen by the cases referred to by the petitioners.

It is possible, the father in his quality of guardian for his minor children, may be entitled to the possession of the real estates of his children when the title is cast on them by operation of law or by devise, where the possession is not controlled by its terms, subject to the common law liability to account for the profits, &c. [See *Coke on Lit.* 88, 89,a; 1 *Black. Com.* 461; *King v. Oakley*, 10 *East*, 490; *King v. Welby*, 2 *M. & S.* 504.] And there are cases as well as analogies, which seem to indicate the parent may in that capacity protect the personal estate of his child, when it has come to its actual possession during minority. [*Smith v. Williamson*, 1 *H. & J.* 147; *Porter v. Young*, 7 *J. J. M.* 501.] However this may be, and we purposely decline to express any opinion, it is evident from the cases previously examined, that a trustee is not warranted in paying over a money legacy to the father. We have found no cases in which the rule has been extended to personal chattels, but from the facility with which these can be removed and converted, it is reasonable they should be protected in the same manner as bequests of money.

2. It may be asked, why shall every executor be compelled to go into chancery to obtain the authority to pay the legacy of an infant to its father, when there is the cheap and more convenient orphan's court which might be invested

with the same power. The answer belongs to the legislative branch of the government, though it is a mistake to suppose a suit would be necessary for this purpose. The usual course is to apply to the chancellor by petition, and on its hearing, the necessary order would be made, investing the parent with authority to recover the legacy, on giving the proper security. [See 1 Smith's Ch. Pr. 653, *et seq.* and cases there cited.]

What has already been said is sufficient to indicate our opinion, that the delivery of the slaves in this case by the executor to the father of the petitioners, does not operate to discharge him from their claim for the legacy. The decree of the orphans' court, is therefore reversed, and the cause remanded.

WATSON AND WATSON V. ANDERSON.

1. When the question of sanity, or insanity, is in issue, a witness may be asked whether there was a difference in the conduct of the deceased during the last five years of his life, and his conduct twenty years previously, and it is error to refuse the question to be put, unless the record shows, that the question was put to the witness in another form, and an opportunity afforded him to tell what he knew.
2. It is not error in the court to refuse to permit the following questions to be put: Have you heard the deceased say any thing about his dogs, and chickens, and cry; if so, what did the deceased say.
3. A witness may be asked, "If the deceased said, or did any thing showing a want of soundness of mind, state what it was."

Error to the Orphans' Court of St. Clair.

THE will of William Watson being offered for probate by the plaintiff in error, it was contested by the defendants in error, heirs at law of the deceased, who alledged the incapa-

city of the deceased to make a valid testament, by reason of insanity, and imbecility of mind; and an issue was made up between the parties, and submitted to a jury.

From a bill of exceptions taken pending the trial, it appears, that after the defendants had introduced evidence tending to prove the insanity and weakness of mind of the deceased, they introduced a witness who testified, that he had known the deceased well for twenty-eight years last past. The defendant then asked the witness the following question: Was there a difference in the conduct of the deceased, during the last five years of his life, and his conduct twenty years ago? The plaintiff objected to this question, and the court sustained the objection, and refused to allow the question to be answered. Another witness, introduced by defendant, testified, that he had known the deceased eighteen years, and lived near him since 1840, and asked him the following question: Have you heard the deceased say any thing about his dogs and chickens, and cry; if so, what did the deceased say? This question was also excluded, on plaintiff's objection.

The plaintiff introduced a witness, who stated, he had known the deceased for several years past, and lived near him, but was neither a physician or a professional man, and asked him, if the deceased said, or did any thing showing a want of soundness of mind, state what it was? The defendant objected to this question, but the court permitted it to be answered. To all which the defendant excepted.

This is the matter now assigned as error.

POPE and RICE, for the plaintiffs in error.

1. The orphans' court erred in refusing to allow the witness, William Taylor, to be examined, as shown by the record.

2. The orphans' court erred in refusing to permit the witness, Thomas Lovitt, to be examined as shown in the record.

3. The orphans' court erred in permitting the question asked the witness, John Vandergrift, as shown in the record, to be answered.

4. The orphans' court erred in proceeding to try the va-

lidity of the paper purporting to be the last will and testament of William Watson, deceased, and giving judgment thereon, without duly notifying or appointing a guardian *ad litem*, for David Watson, a minor heir at law of said Wm. Watson, deceased, as shown in the record.

5. The orphans' court erred as shown by the bill of exceptions.

CHILTON, for the defendant.

1. The objection to the questions asked by plaintiff in error was well sustained, as the questions were leading and illegal.

The difference in the conduct of a party in the last five years and twenty years past, is a conclusion which the jury should draw from the evidence as to what was the conduct of the testator at the respective periods. [Strawbridge v. Span, 8 Ala. 825; Greenl. Ev. 481.]

2. It is discretionary with the court to allow or refuse leading questions; and this court, as it is not advised as to the necessity which existed for the exercise of the discretion, in the the court below, should not revise. [Towns & O'Brien v. Butler & Alford, 2 Ala. 378, 381; People v. Mather, 4 Wend. 229; Blevins v. Pope & Son, 7 Ala. R. 371.]

3. The court will refer the objection below to the form instead of the substance of the question, and as it does not appear that the plaintiff had not the benefit of all the testimony elicited under less objectionable interrogatories, the court should not reverse, as in this case no injury has resulted to the plaintiff.

ORMOND, J.—The mode in which the examination of a witness shall be conducted, must in a great degree be left to the discretion of the judge trying the cause. He may permit the examination in chief to assume the form of a cross-examination, if he considers it necessary, to enable the party to extract the truth from an unwilling witness. [Blevins v. Pope & Son, 7 Ala. 374.] If the objection is merely to the form of the question, and the court should erroneously refuse to permit it to be put, supposing it to be leading, when it is not, it is an error revisable in this court, unless the re-

cord shows that the question was again propounded in another form, and the facts sought to be elicited brought out ; or at least an opportunity afforded the witness to tell what he knew.

The first question proposed to the witness, Taylor, was in our opinion, entirely unexceptionable. The objection to questions of this kind is frequently captious, and made when there is no danger of the witness being prompted to answer in a particular way ; and if the attention of the witness cannot be directed to the points to which his testimony is wanted, it would be difficult, and frequently impossible, especially in cases of this description, to get from him the facts which he might know. The objection to this question is, that it assumed the fact, that there was a difference in the conduct of the deceased during the last five years of his life, from the preceding period, during which the witness had known him ; and if the witness had answered there was such a difference as the question supposes, it would have availed the defendant nothing, he must have gone further, and explained in what the difference consisted. It is therefore perfectly clear that the question was harmless, although in form to some extent leading, and should not have been excluded.

The next question is not so clearly unexceptionable, as it assumes the existence of a state of things, from which imbecility of mind might be inferred—and although it is difficult to suppose, that the opposite party could have been prejudiced by the form in which the question was put, we are not prepared to say, that under the discretion which must necessarily be reposed in the presiding judge, the refusal would be such an error, as would be sufficient to reverse the case.

The last question was clearly proper. The objection urged against it here is, that it referred to the opinion of the witness, whether the deceased was of sound mind or not. We do not think the opinion of the witness was asked, or expected to be given. The question merely pointed his attention to the subject upon which he was to be examined, the capacity, or soundness of the mind of the deceased, in reference to which he was asked to state what he said, or did. When these declarations or acts were stated, it was for

the jury to determine, whether they established soundness or unsoundness of mind.

For myself, I must say, that I have attained the conclusion to reverse this case very reluctantly, as it is incomprehensible, if the objection was to the form of the question merely, as it is admitted to have been, why it was not presented in one of the many other shapes in which it might have been conceived, and the facts within the knowledge of the witness elicited.

For the error of the court in refusing to permit the first question to be put to the witness, Taylor, the judgment must be reversed, and the cause remanded.

THE STATE v. IVEY.

1. Where a point or question arising in any criminal case is referred to the Supreme Court as novel and difficult, it should be brought before that court at the first term after the trial below : and if the record is not then brought up, the judgment or sentence should be executed. Perhaps after the lapse of a term it may be allowable to revise on writ of error the point referred, if regularly presented upon the record.

On points reserved, from the Circuit court of Dale.

THE defendant was indicted at the spring term of the circuit court holden in the year 1845. for unlawfully and verbally giving a challenge to one J. Hosea Calloway, to fight in single combat with a deadly weapon, &c. The indictment was traversed, and the issue submitted to a jury, who returned a verdict of guilty, whereupon the defendant was sentenced to imprisonment in the penitentiary for the term of two years. Upon the trial certain legal questions were referred to this court as novel and difficult.

THE ATTORNEY-GENERAL for the State, insisted, that this case was not brought up within the time prescribed by law, and should therefore be dismissed ; but if the court thought otherwise, then he contended that the points referred, had been correctly ruled at the trial.

B. F. PORTER, for the defendant, contended, that although the record was not filed at the first term of the trial, this court might entertain the cause. Upon the points referred to he insisted, 1. That the charge to the jury was uncalled for by the evidence, and calculated to mislead them. 2. The nature of the challenge is not sufficiently shown by the indictment. [Hale's Pl. of Cr. 169, 170 ; 2 McC. Rep. 377 ; 3 Id. 533.] 3. The indictment does not distinctly allege who were the parties to the intended combat. [7 Ala. Rep. 69.]

COLLIER, C. J.—The first section of the tenth chapter of the penal code, [Clay's Dig. 469, § 1,] enacts that whenever in any criminal case, &c., any point or question shall arise, which in the opinion of the presiding judge is novel and difficult, it shall be his duty, on request, to reserve the same distinctly upon the record for the revision of the Supreme court at its next succeeding term, and the presiding judge shall proceed to render judgment on the conviction ; but the execution of the judgment shall be suspended in cases not capital, or not punished by confinement in the penitentiary, until the next succeeding term of the Circuit court rendering the judgment ; and the defendant shall be recognized, &c. ; and in capital cases, or in cases punished by confinement in the penitentiary, the execution of the judgment shall be suspended to a time not less than twenty-five and not more than forty days after the commencement of the next succeeding term of the supreme court.

We think this enactment requires, that the points reserved for revision should be brought before this court at the first term after the trial below, and if the record is not then brought up, the judgment or sentence should be executed in obedi-

ence to its directions. This court should not revise and adjudicate the points reserved at any subsequent term, but the convict, if he complains of an error to his prejudice, might perhaps apply for a writ of error, and the appropriate correction be made, and justice administered according to law. In the case at bar the record was not filed until the 17th July, 1846, more than twelve months after it was returnable, and at least that length of time after the sentence should have begun to be executed. We cannot entertain the cause as presented, and it is therefore dismissed.

SAVAGE v. BENHAM, ADM'R.

1. Where the testator in his will directs his executors to carry on his plantation, in the same manner as he himself had carried it on, until the death of his wife, and after a partial administration of the estate by one of the executors named by the will, the administration is committed with the will annexed, to another person, who enters on the performance of this trust of the will, the orphans' court has jurisdiction to require him to make annual settlements; and when he makes an annual settlement, pursuant to the act of 1843, that may be reviewed in this court by writ of error.—*Quere?* however, whether those interested in the final settlement afterwards to be made, will be precluded from *surcharging* the annual settlements.
2. When a single person appears and contests a settlement in the orphans' court, the contesting party is the one in whose name the writ of error should be sued out, there being no final judgment in favor of any others interested in the settlement.
3. An administrator with the will annexed, carrying on a plantation under a power in the will, to do so in the same manner the testator had done, is required to show when settling his accounts in the orphans' court, to sustain his charges for articles furnished for the estate, or the payment for services rendered, that the same came to the benefit of the estate, or were rendered to it.
4. Beyond this, so far as his acts are consistent with good faith, it is not in-

- cumbent on him to show, that the articles purchased were necessary, or the price paid was reasonable. Under such a will, his discretion will not be reviewed, unless exercised in so unreasonable a mode as to produce distrust of its *bona fides*.
5. Such an administrator is not chargeable with, and therefore is unauthorized to pay the debts contracted by the executor on account of the estate, except under such circumstances as would induce a court of equity to charge the estate.
 6. A constable's receipt, purporting to be for the payment of a judgment against the estate, is not of itself a sufficient voucher to prove the debt, or its payment.

Writ of Error to the Orphans' Court of Lauderdale.

THE errors complained of in this cause are supposed to arise out of the decree of the orphans' court, in the matter of an annual settlement of the estate of Samuel Savage, had before said court, in 1846, by Benham, the administrator with the will annexed.

The account having been stated by the court, and publication ordered for those interested in the estate to appear, &c. Martha Savage, as administratrix of the estate of Samuel G. Savage, deceased, who was a legatee under the will of Samuel Savage, appeared and filed exceptions to certain items in the account, and required proof of the same.

The first item excepted to is a charge of \$45 for a horse. In support of this, the administrator produced a receipt, purporting to be made by one Johnson, for that sum, for a horse sold to the administrator, for the use of the plantation of the deceased. The party contesting objected to this proof, unless the execution of the receipt was proved, and unless it was also shown that the horse was purchased for the benefit of the estate, at a reasonable price. The court decided the receipt proved itself, and was sufficient evidence of all the facts which the contestant required to be proved.

The court also decided with respect to this item, that as it was not excepted to in writing, no objection could be urged against it at the hearing.

Another item is, a charge for \$109 paid B. F. Rhodes. To

support this, the administrator produced a note, purporting to be made by one George M. Savage, as executor of Samuel Savage, the decedent, and also produced affidavits to show this note was given to the payee for an account against the estate of Savage, for shoes and leather for the benefit of that estate.

A clause in the will annexed to the administration provides as follows: "My tract of land I wish to remain undivided, and my plantation conducted in the same manner as I have carried it on, until the death of my beloved wife, and I do hereby empower my executor to do all and any thing necessary for the purpose of keeping up my plantation, by keeping the negroes, stock, tools, &c. on the plantation, by employing overseers, buying and selling stock and farming utensils, necessary for the culture of the same; and in all things to act for the prosperity of the plantation affairs as I have been accustomed to do. When my youngest children arrive at the age of twenty-one years, it is my desire that they shall be advanced by my executors, by giving them as much property as I have given to my elder children on their marriage or majority. I charge my executors to do it with a special regard to the management of my plantation to the best advantage."

The administrator then proved the admission of the contestant, that the note on which this item was founded, was given for shoes and leather purchased for the estate, at the instance of George Savage, and that the same were used by slaves of the estate. The contestant objected to this evidence—

1. Because the affidavits were *ex parte*.
2. Because there was no proof that the articles were necessary for the slaves of the estate, or that the prices charged were reasonable or proper.
3. Because it did not appear that George Savage had settled his executorship with the orphans' court.
4. Because there was no proof that George Savage was insolvent, or that he resided out of the State.
5. Because there was no proof of a promise by the administrator to pay this debt.
6. Because this note was not a charge against the estate,

for which the administrator was liable. The court allowed the charge.

Another item of charge for a note of George Savage, made to one Harkins, and paid by the administrator was allowed on similar proof, against similar objections.

Another item of charge, for the amount of an account contracted by George Savage, with T. M. & J. Harkins, on account of the estate, and charged to the estate, was allowed on similar proof against similar objections.

Another item of charge, for payments made to the attorney of A. C. & W. A. Austin, on account of a note executed to them by George Savage, was admitted on similar proof, against the like objections.

The contestant excepted to the several rulings of the court, and they are now assigned as error.

In another cause between the same parties, being the annual settlement of the same estate, for the year 1844, several items of charges were excepted to by the contestant, amongst which is one of a payment of \$407 to John Simpson & Co. and another of \$441 to Charles Gookin. To sustain those items, the administrator introduced the will as before stated. He then proved these items were for merchandize sold by the parties respectively to himself, and charged by his direction to the estate. The contestant objected to the sufficiency of this proof, and insisted the administrator should further prove that the articles paid for were necessary for the purpose of carrying on the plantation, and that they were used for the benefit of the estate.

Another item of \$10 63 was supported only by the production of a constable's receipt for that sum, purporting to be for a judgment against the estate.

The other items objected against, are several amounts of \$232, \$262 50 and \$150, paid for professional services in a suit in the Supreme Court of the United States. It was proved that all these items were for moneys expended by the administrator for debts contracted by himself. The contestant insisted he should show further, that a necessity existed to contract these debts, and that the consideration of them passed to the estate of Savage. The court refused to require such proof, or any proof on the subject, and decided

that the administrator was the sole judge of the necessity of creating the debts, which in his account purport to have been created and paid by him—that their creation and payment were sufficient vouchers to charge the estate.

The contestant excepted, and these matters are assigned as error in that cause.

The two causes were argued at the same time.

L. P. WALKER, for the plaintiff in error, insisted—

1. That the mere receipt of a third person produced by the administrator, is no evidence to charge the estate. [Alexander v. Alexander, 8 Ala. R. 797.]

2. The circumstance that no written exceptions were filed as to particular items, did not preclude their investigation by the court. [Steele, adm'r, v. Knox's Distributees, 10 Ala. Rep. 609.]

3. The power given by the will is to purchase necessary articles—therefore proof should be given of this fact as well as that they were for the estate. [Alexander v. Alexander, 8 Ala. Rep. 797.]

4. The debts contracted by Savage, the previous representative of the estate, were no charge against the estate. [2 Porter, 33; 3 ib. 221.] Even if the estate might be charged, if Savage was not indebted to it, the creditor does not show a state of facts to call for a payment from the estate. An administrator cannot bind the estate by his contract. [McBeth v. Smith, Const. Rep. 676; McGhee v. Price, 2 N. & McC. 328; Hanaker's Est. 5 Watts, 204.] Nor can an administrator *de bonis non* be charged on an implied contract by the administrator in chief. [O'Neal v. Abney, 2 Bail. 317.]

5. The general rule is, that all trustees must show *prima facie*, that expenditures by them are warranted by the circumstances of the case. Here the court refused to require any proof whatever.

E. W. PECK, for the defendant in error, suggested a preliminary question, whether the writ of error was not premature, as a judgment in a case like this is interlocutory only. [Merrill v. Jones, 5 Porter, 554; Harrison, *Ex parte*, 7 Ala.

Rep. 736 ; Watson v. May, 8 ib. 177.] Besides this, all the parties to the settlement are not before the court, as there were other parties in interest, who did not contest the settlement. [7 Ala. Rep. 928.]

On the merits he insisted—

1. That the estate of Savage was chargeable in equity for the articles furnished to the previous executor, as they were used for the estate, and if so, the administrator was authorized to pay these debts. [1 McCord's Ch. 269; 4 Dess. 19, 54.]

2. It cannot admit of question, under this will, the representative was the judge of the necessity for supplies.

3. The rule, that exceptions shall be in writing, is settled in Douthitt v. Douthitt, 1 Ala. Rep. 594, and again in Watson v. May, 8 ib. 181.

GOLDTHWAITE, J.—1. We shall first consider the objection taken to the review of this settlement on the ground that a writ of error will not lie until the estate is finally settled. Annual, as distinguished from final settlements, seem to be recognized by much of the legislation previous to the enactment of '43, under which this settlement was made. Thus, guardians as well as executors and administrators, allowed by the orphans' court to keep the estates of their testator or intestate together for a period beyond the scope of an ordinary administration, were required to state their accounts annually. [Digest, 267, § 3; ib. 198, and § 30, 31, 37.] Another general statute provides that all trustees, whether appointed by will or by deed, shall annually state their accounts to the circuit court of the proper county. [Digest, 582, § 6.] Another provides that the documents and evidence of all settlements with executors, guardians and administrators, shall be carefully preserved, and shall not be impeached except for fraud in obtaining the same. [Digest, 304, § 37.] Another invests the orphans' court with authority to displace any executor or administrator who has embezzled or misapplied all or any part of the decedent's estate. [Digest, 221, § 4.] From these enactments it is evident the orphans' court was intended to be invested with the most plenary jurisdiction over the several subjects they

relate to, and that the power of removal could not well be exercised without an inquiry into the state of the party's accounts. They show further the general scope of legislation is to place all trustees, of whatever description, under a strict accountability, and chiefly at annual periods. Until the enactment which we shall presently advert to the annual settlements of executors, administrators and guardians, had no other effect than to furnish the means of arriving at the true state of the final account, and the preservation of evidence in favor of and against the guardian, and what is said by this court in *Willis v. Willis*, 9 Ala. Rep. 330; *Cunningham v. Pool*, ib. 615; and *Powell v. Powell*, 10 ib., is spoken of accounts stated or allowed previous to that enactment. By it the mode of proceeding is described when it shall be necessary for an executor, administrator or guardian to make either an annual or final settlement of his accounts, and the decree upon it when made is to have the force and effect of a judgment at law. We are entirely satisfied it covers a case like this, and that without any other than the general legislation upon the subject, that the orphans' court has the jurisdiction to require executors, and administrators with the will annexed, to exhibit annual accounts whenever by the terms of the will the administration will necessarily be protracted beyond the ordinary period. It follows, that an annual settlement being within the terms of the act referred to, it may be examined in this court by writ of error. It may admit of question, and therefore we state it as a *quere*, whether annual settlements under this act may not be *surcharged* at the final settlement by those then interested.

2. With respect to the other objection, we think it cannot prevail. It appears, or rather we will assume, that the necessary publication was made. As no other than the party contesting appeared in the court below to contest the accounts of the administrator, and as no judgment was rendered in favor of others, she is the only proper party before this court, in the actual condition of the record. [*Harrison v. Harrison*, 9 Ala. Rep. 470; *Watson v. May*, 8 ib. 177.]

3. This brings us to a consideration of the merits of the proceedings in the court below, which may be briefly disposed of. Considering the administrator as succeeding to all

the powers and duties cast by the will on the executors therein named, he was notwithstanding a mere trustee, and as such required to show affirmatively that every charge made by him for debts contracted by himself in that capacity, was for articles which actually came to the use of the estate or for services to it. Thus much the law requires him to show, no matter what was the discretion with which he was invested, and without the influence of this rule, there would be no check whatever on his charges. In the very nature of things, there can be no exception to this rule, as in it rests the notion that trustees are accountable for the mode in which the trust is performed. [Alexander v. Alexander, 8 Ala. Rep. 797.]

4. Beyond this, so far as his acts were consistent with good faith, we think it was not incumbent on him to show the articles were necessary or proper, or that the price paid or agreed to be paid was reasonable. Under the clause in the will, it is certain if he succeeded to the trust as such, that his discretion was of the most extended nature, and in our judgment no court would be warranted in charging him for its exercise, unless the unreasonableness of his contracts was such as to induce a well guarded distrust of their *bona fides*.

5. In regard to the several items of charge for notes and accounts contracted by Savage, one of the executors, and paid by the administrator, we can only say the proof at the hearing did not warrant their allowance. Ordinarily the personal representative of an estate cannot bind its assets by contracts, nor is one administrator responsible for the acts of another. It is, however, held in England, that where a testator directs his trade to be continued after his death, the estate may be charged in the event of the bankruptcy of the executor, when the general assets of the estate are directed to be used in the trade, or to the extent of the particular fund directed to be used. [*Ex parte* Garland, 10 Vesey, 110.] To what extent the same or similar rules are applicable in this State, we shall decline at present to decide, as it is only necessary to determine here that the assets of the estate are not chargeable until the insolvency of the personal representative is made to appear. Whether they are so in that event

may possibly depend on the circumstance of his being a creditor of the estate.

6. In relation to the small charge for which a constable's receipt was produced, it seems to fall within the category of other claims attempted to be established by evidence which might be fabricated at pleasure. Doubtless the recovery by any one of a sum of money against the estate by action, would warrant the executor or administrator in paying it, but on contestation of the fact of payment, that as well as the existence of the debt should be proved by competent testimony.

This consideration of the cause enables us to decide the several questions presented. The several items of charge by the administrator for moneys paid or debts contracted by himself should have been sustained by evidence showing those debts were contracted for articles or services which came to or were rendered for the benefit of the estate. The items on account of debts created by the executor, Savage, could only be sustained by showing a state of facts which in equity would subject the assets of the estate to the several creditors; and the charge for the sum paid to the constable should have been supported by proof of the existence of a judgment binding the estate as well as its payment. On all these points the proof in the court below seems to be defective. Judgments reversed, and the causes remanded.

THE STATE v. CLARISSA, A SLAVE.

1. To constitute the crime of an "attempt to poison" a white person, by a slave, there must be an actual attempt to poison, by the administration of some poisonous drug, or substance, calculated to destroy human life.
2. An indictment under this statute, must alledge, that the substance admin-

istered was a deadly poison, or calculated to destroy human life. An indictment which alledges the administration of the seed of the Jamestown weed, but does not contain an allegation that it is a poisonous substance, calculated in its effects to destroy human life, is insufficient to sustain a judgment.

3. The grand jury cannot be called, and required to expurgate themselves of any supposed interest, or bias, at the instance of one in jail, and expecting an indictment to be preferred against him. Objections to the grand jury must be taken by plea in abatement, at the term at which the indictment is found.
4. Where a slave after a whipping had confessed her guilt, and subsequently when the overseer inquired why she had committed the act, confessed the crime: held, that the answer to this question was not admissible evidence, as the question assumed the fact of her guilt as previously admitted by her. *Quere*—Would the subsequent confession of a slave, after a confession had been extorted, be evidence in any case?

Error to the Circuit Court of Dallas.

THE prisoner was indicted for an attempt to poison, by an indictment, as follows: The grand jurors for the State of Alabama, empaneled, sworn and charged, &c., upon their oaths present, that Clarissa, the property of, &c., on, &c., feloniously and wilfully did administer to, and cause to be administered to, and taken, by one Nelson Parsons, and one Hezekiah Bussey, then and there, being free white persons, a large quantity of a certain noxious, and destructive thing, called the seed of Jimson weed, or Jamestown weed, to wit, two ounces thereof, with intent then and there, and thereby feloniously, wilfully, and of her malice aforethought, the said Nelson Parsons, and the said Hezekiah Bussey, to poison, kill, and murder, against the peace and dignity of the State, &c. &c.

Previous to the finding of the bill of indictment by the grand jury, on the third day of the term, the defendant by her counsel, stated that she was confined in the jail of Dallas county, charged with having attempted to poison certain persons, and that her case would probably come before the grand jury then sitting, and moved the court for leave to have the grand jury brought into court, and purged, in reference to defendant's guilt or innocence; and that each of them might be asked, if before they were summoned and or-

ganized, and at the time, they had any fixed opinion, as to the guilt or innocence of the accused, which would bias his finding; which motion the court refused, and the defendant excepted.

A true bill being found, upon the trial of the prisoner, it was proved that she was the cook of Parsons, who lived on the plantation as her overseer, and that he and Bussey having partaken of coffee at breakfast, prepared and administered by the prisoner, were affected in the same manner as if they had taken narcotic poison. The State also offered to prove, that for a succession of days previous, she had prepared and administered coffee similarly charged with poison, and producing violent effects. The prisoner's counsel objected, unless it was proved, the coffee was administered both to Bussey and Parsons, which objection was overruled.

The State introduced Chloe, the mother of the prisoner, who stated, that she cooked for the negroes on the plantation, and was often in the kitchen, where the prisoner prepared the overseer's meals. That on two occasions, she had seen the prisoner put a small bag of the seed of Jamestown weed, in the coffee-pot—that one of these occasions, was on the morning when Bussey breakfasted with Parsons. That not wishing to see Bussey her master poisoned, during the absence of the prisoner, and whilst the coffee was boiling, she took the bag of seed from the coffee-pot, and threw it away. The witness stated, that at first she had denied all knowledge of the poisoning, but on being whipped by Bussey, had disclosed the above facts, which she insisted were true. That the prisoner was also whipped with great severity, but refused to make any confession; but on being informed by Bussey her master, that Chloe had confessed what she knew, made a confession, that she had prepared and administered the poison in the coffee.

This confession was on motion of the prisoner, excluded.

It was also proved, that after this confession, which was on Thursday, the prisoner was removed from the house to the field, and on the next Saturday was sent for by the overseer, to look up some of his clothes. The overseer asked her which she liked the best, cooking, or working in the field, and on her answering that she preferred the former, he

then asked him why she had continued to give him poison, when she saw him so near dying from the effect of it. She replied that she did not know, unless it was the devil that put it into her head. Parsons then told her, that her return to the kitchen depended on her future good conduct, but was uncertain whether this was told before or after this confession.

The prisoner's counsel moved to exclude this confession, which the court refused to do, but instructed the jury, that it was difficult in the case of a slave to apply the rules of law in regard to confessions. That slaves might be considered as in almost a state of duress, and under all circumstances, confessions made by them, ought to be received with a great deal of caution. That the last confession could not be excluded from the jury, and yet upon that alone, it would be unsafe to convict the prisoner. If, however, they were satisfied beyond a reasonable doubt, that it was fully sustained and corroborated, by other independent testimony, they could not but find the prisoner guilty under the indictment.

The prisoner's counsel then moved the court to charge the jury, that if they believed the said Bussey and Parsons had been poisoned by the prisoner, she could not be convicted on the indictment of an attempt to poison them, which charge the court refused.

To all these matters the prisoner excepted, and now assigns as error, as also that the indictment is insufficient.

The prisoner was found guilty, and condemned to be hung.

PECK, for the plaintiff in error.

ATTORNEY GENERAL, for the State.

ORMOND, J.—The offence for which the prisoner was indicted, is in the language of the act, an "attempt to poison" a white person, which in the case of a slave is a capital offence. The offence consists in the attempt to do an act, which if consummated, would have caused death, and cannot be committed but by the actual attempt to administer a poisonous drug, or substance, calculated to produce death. An unexecuted determination to poison, though preparation was made for that purpose, or the actual administration of a sub-

stance not poisonous, or calculated to cause death, though believed to be so by the person administering it, will not be an attempt to poison, within the meaning of the statute. From this analysis of the statute, it follows that the indictment should alledge, that the substance administered was a deadly poison, or calculated to destroy human life, as it is necessary that every indictment should warrant the judgment rendered upon it. Yet every allegation in this indictment may have been proved, and the life of the persons against whom the supposed attempt to poison was made, never have been in jeopardy; as it cannot be known as matter of law, that the seed of the Jamestown weed is a deadly poison. The moral guilt, it is true, is as great in the one case as in the other; but that is not the offence which the law intended to punish; but the actual attempt to poison, by means calculated to accomplish it.

The attempt to purge the grand jury, as it is called, was wholly unauthorized. In the State v. Hughes, 1 Ala. 658, it was held, that the grand jury could not be asked, before they were sworn, whether they had not formed and expressed an opinion, as to the guilt or innocence of one whose case they would probably have to pass upon. Such was also the opinion of the court in Tucker's case, 8 Mass. 286. In Hughes' case, *supra*, this court intimated, that challenges for causes, not operating a universal disqualification, might be made after the jury was elected and sworn. It was not intended by this suggestion, that the grand jury should be called at the pleasure of any one, expecting to have a charge preferred against him, and compelled to expurgate themselves of any supposed bias, but that after indictment found, the objection might be made. This was afterwards provided for, in the penal code, by restricting a plea in abatement to the array of the grand jury, or to the disqualification of any of its members, to the term at which the indictment is found. [Clay's Dig. 458, § 51.] We are clear in the opinion, that no such right exists as that claimed in this case.

Although the confessions of slaves, freely and voluntarily made, uninfluenced by threats or promises, must, as in the case of white persons, be received in evidence, it must be admitted, their condition in the scale of society, throws a

certain degree of discredit over any confession of guilt they may make, and renders it unsafe if not improper, to act upon such evidence alone, without other corroborating proof. But when a confession has been extorted by threats or punishment, or obtained by promises of favor, it would seem that no subsequent confession of the same facts, ought in the case of slaves, under any circumstances to be admitted, as even a recantation of what was once admitted, would be to expose the accused again to punishment. We need not, however, decide the general question, whether such subsequent independent admissions of the same facts, could in any case be competent, as it is clear those made in this case, should not have been received.

The overseer, as it appears, some two or three days after the confession of the prisoner, made after having received a severe whipping, inquired of her why she continued to give him poison, when she had seen him so near dying from the effect of it. This inquiry assumed the fact of her guilt, from her previous confession, and did not even in form, propose the question of her guilt or innocence, but merely demanded a reason for her conduct. To hold that the reply of a slave to her overseer, under such circumstances, was testimony of the fact, thus impliedly asserted, because it could not be denied, would be exceedingly improper. The humane policy of our law, would exclude such evidence, coming from a white person, and the reason is much stronger for excluding it in the case of a slave.

The judgment of the court below must be reversed, but the prisoner will remain in custody for another indictment, or until discharged by due course of law.

DOE EX DEM. KENNEDY'S EX'RS v. JONES.

1. Where, previous to the year 1800, the Spanish Governor of Louisiana, upon a petition praying the grant of a tract of land, directed the commandant at Mobile to put the petitioner in possession of the tract, and to forward the proceedings of survey, for the purpose of procuring the petitioner a title in due form: *Held*, that the concession of the Governor was a mere gratuitous assent to the prayer of the petition, and gave nothing more than a permission to occupy; the fee remained in Spain until the survey was made in due form, the fact communicated to the Governor, and the evidence of title furnished.
2. An inchoate grant by Spain, previous to the treaty of St. Ildefonso, only imposes upon the United States a political obligation to validate it so far as it is binding in conscience; but until it is confirmed, it confers upon the grantee no right which an American court will recognize. A confirmation by Spain subsequent to the treaty by which it yielded up its right to the soil, is wholly inoperative to affect the title of others, acquired after the original grant.
3. The dedication of a street in a town or city, may be inferred from public documents of an ancient date which refer to it as then existing, or from the deeds, or other papers of those who deny its existence.
4. Upon proof that a street was used as such, at a definite period, many years previous to the institution of the suit in which the question is involved, it may be inferred, in the absence of opposing proof, that it was dedicated to the use of the town, even before the time proved.
5. Where the streets of a town bordering on navigable water, are dedicated to the use of the town and the public, if there is no limitation, the dedication will extend across the shore to low water mark, as the shore may be reclaimed, or fill up by accretion, and become part of the town.
6. The transfer of the possession of Mobile and the adjacent country, from Spain to the United States, in 1813, did not interfere with the rights of property, the plan of the town, or the right of its inhabitants to use the public streets as they previously had done.
7. To perpetuate the dedication of streets, it is not necessary that there should have been a continuous corporate existence of the town.
8. The general rule, that the fee cannot remain in abeyance, does not apply, where property is dedicated to the public use, and where the object and purpose of the appropriation looks to a future grantee, in whom, or in which, the fee is to vest. The dedication will preclude the party making the appropriation from reasserting any right over the land, at least so long as it remains in public use, although there may never arise any grantee capable of taking the fee.

Doe ex dem. Kennedy's Ex'rs v. Jones.

9. Although the fee of a street may be in an individual, is it not competent for the corporate authorities of the city, to cause to be erected, a wharf, or other convenience for the mooring or anchorage of vessels at the *terminus* of the street on navigable water, and demand wharfage and other kindred charges; and if this may be done by the corporation, may it not confer upon a third person, in consideration of a yearly rent, the privilege of making such erection, &c.
10. If land dedicated to the public has been used by a corporation for a purpose not contemplated in the dedication, will such an abuse of the right of use, invest the original proprietor of the fee with the right to the possession, so as to entitle him to maintain ejectment? Should not a court of equity be resorted to in such case, to compel the execution of the trust.
11. It is allowable to show on a trial at law, that a grant of land at Mobile, purporting to have been made by an officer of Spain, while that government was in possession of the country was unauthorized, and consequently void.
12. Where a commission for the examination of claims under Spanish grants, &c., makes a special report on a grant which is void, and an act of Congress is passed confirming the report, and providing for the location and survey of lands to which the title is thereby confirmed; but neither the report nor the act ascertained the limits or boundaries; in such case reference must be had, either to the survey made under the act, or to the patent consequent upon the survey, for the purpose of ascertaining the location of the land.

Appeal from the Circuit Court of Mobile.

THIS was an action of ejectment at the suit of the plaintiff in error, for the recovery of land thus described in the declaration, viz: "All that certain lot of ground covered with water, together with the wharf thereon erected, and the dock thereupon, with all the water privileges thereto appertaining, situate, lying and being in the city of Mobile, and county of Mobile, in front of, and east of St. Louis street, and between Commerce street and Mobile river, bounded on the south by property of William Jones, Jr., on the north by property of Joshua Kemdy, on the east by the channel of Mobile river, and on the west by Commerce street—being of the same width as St. Louis street extends; and commonly known as the wharf and dock at the foot of St. Louis street."

The defendant having pleaded *not guilty*, under the usual consent rule, the cause was tried by a jury, who returned a

verdict for the defendant, and judgment was rendered accordingly. On the trial, the plaintiff excepted to the ruling of the court. From the bill of exceptions it appears, that the plaintiff claimed the possession of a wharf built on piles in the water, immediately in front of St. Louis street, and commencing on the east side of the line of Front street, and extending into the river. The claim was made in virtue of a riparian right, and as appurtenant, or belonging to the proprietor of the soil bordering on the river. To make out the title, the plaintiff gave in evidence a grant called the "Price Grant," and proved the signatures of St. Maxent and other officers thereto, and read the same to the jury with the documents, map, &c. accompanying it; also, the records of the proceedings in the land office, the reports of the officers thereon, the patent certificate, with the certificate of survey, and the survey thereof, together with conveyances from Price to Wm. E. Kennedy, and from the latter to Joshua Kennedy, the lessor's testator—all which are made part of the bill of exceptions. The plaintiff also read to the jury the acts of Congress confirming the title sought to be established.

Evidence was also adduced by the plaintiff to show that Wm. E. Kennedy had obtained the possession of the land under the grant, and had transmitted the possession to the testator—having himself sold at different times certain portions of it. C. Delarge, a witness for the plaintiff, proved that St. Louis street was included in the "Price Grant," that the survey and patent included it; that the survey of the United States placed the boundary line a little south of St. Louis and a little west of Water street; that the front line is designated as the ancient margin of the river, but as late as 1819, the ordinary high tide at the place in question flowed further west, perhaps as much, or more, than one third of the space between Water and Royal streets. Witness further stated, that all the land between where the water then flowed, and where it now is, east of Front street, has been reclaimed by filling up at different times—the streets by the corporation, and the remainder by the proprietors of adjacent lots. In 1819 and 1824, the premises in question were covered with water, "and the land back of it, was open and vacant down to the water." It was proved that the wharf is

Doe ex dem. Kennedy's Ex'rs v. Jones.

used as private property, and would rent for about \$2,000 a year.

The defendant claimed the wharf under a lease from the corporation, pursuant to a resolution of the Mayor and Aldermen of Mobile, a copy of which lease and resolution are made part of the bill of exceptions. The wharf, as well as one previously erected, were built by the defendant under the lease. Before that time there was only a mud flat, or marsh in front of the street. As the foundation of the title of the corporation, the act of Congress of 1824, granting the front to the city was read; and the defendant further claimed under the right of the city acquired by the dedication of the street to public use.

To prove that St. Louis street was a street of Mobile, under the government of Spain, offered in evidence, deeds and Spanish records, copies of which are attached to the bill of exceptions. He also gave in evidence a map of the city, and of the lands of Joshua and Wm. E. Kennedy, made at their instance in 1817, or 1818, by one Matthews, a surveyor, which map was held and recognized by them, and by it they sold lots. St. Louis street is laid down on the map, and projected in the water as well as on the land. He further proved, that they sold lots bounded on streets laid down on that map, in 1818, and after that time on St. Louis street; but it did not appear that they sold any on the last named street below Royal street till 1835. No witness deposed that St. Louis street existed, or was used or known while Mobile was under the government of Spain, between Royal street and the river; the only witness examined to that point, testified, that St. Louis street, under the Spanish government, existed between Royal and St. Joseph streets; that down to the time the United States took possession of the country, it was only a narrow lane or street, and that east of Royal street it had no existence—that place being an open common. The defendant however relied on the records to show that St. Louis street was a public street, known to the public officers and recognized as such by Spain.

The defendant next offered in evidence a map made by Goodwin and Hayne, as surveyors of the city, and proved that it was adopted by the corporation in 1825, as the official map. A copy of which is annexed to the bill of excep-

tions, and on it Church, St. Louis, Congress and Adams streets are projected; but there is none designated as "North Boundary street." It was also shown, by the records of the corporation, copies of which are attached, that it had made large expenditures of money for filling up the streets.

Water street was filled up at the point where St. Louis street reaches it, so as to exclude the water, in 1828, and from that point east, St. Louis was afterwards reclaimed; *further*, Commerce, Front and St. Louis streets were filled up to the river, by the corporation, as other streets were. As St. Louis was thus reclaimed, it was extended to the river, "and used as a street until the wharf was built, joining Front street where it now is."

The defendants then offered transcripts from the land office, reports of commissioners, &c. for the purpose of showing that the grant to Price was fraudulent, and not made in fact by the Spanish officers at the time it purports, nor while they were in office—all which are made part of the record in this cause. "The actual terms and survey of the Price grant and the patent," does not embrace the property now sued for.

Upon the evidence recited, the court charged the jury—
1. If they believed that St. Louis street had been dedicated and established under the government of Spain as a public street, and was so recognized previous to the treaty with France, by which Louisiana was acquired and that it extended to the river Mobile, then the fee of the street would be in the public, for the use of the city, that all riparian rights in front of that street would belong to the city, that the corporation of Mobile would succeed to the Spanish town, and the city was entitled to the fee in the land. *Further*, the extension of the street to the river, from time to time, after the change of flags, would not prevent the corporation from holding by the same right; the riparian right would belong to the street, and the city, and the plaintiff could not claim it. That they might consider of the evidence before them—it was competent to show that such dedication existed, and that it was a public street under the Spanish government. 2. It was competent for the defendant to show, that the Spanish grant to Price was fraudulent, as having been made by the Kennedys, or others not in authority; they

might take the documentary proof referred to, into their consideration, and if from that evidence they believed it fraudulent, the plaintiff's title "would be limited by that granted to him by the United States patent." 3. If they believed the Spanish grant to be fraudulent, it was void; and in such case the plaintiff was not entitled to recover, as he could claim no riparian rights under the confirmation by Congress—his rights thereby were limited by the description in his patent from the United States, which does not make the river his boundary.

A. F. HOPKINS and G. N. STEWART for the appellants. A riparian proprietor has the right of extending improvements across the shore of navigable water, if they are beneficial to the public, and not injurious to the navigation. The right to embank, at common law, belongs to the adjacent proprietor. [Ang. on Tide Waters, 131, 134, 150, 158, 159, 160.] He has an unquestionable right to the water boundary, and no one else can exclude him by making embankments. [Id. 162; 8 Port. Rep. 34; 3 Ala. R. 294.]

The right of property which the State has in the shore, and in land covered by navigable water, can only be used as a protection against an occupation which would be injurious to the public. [Ang. on Tide Waters, 161; 3 Ala. Rep. 294.] It has been dedicated to the use of the people of the United States, and of this State, and neither can grant any right in the same. [9 Porter's Rep. 590, *et post*; 8 Id. 34; 3 Ala. R. 294; 3 How. Rep. (U. S.) 212.] The soil used for a street may, by the common law, be dedicated to that purpose; and the dedication may be inferred from the public use, and the acts and acquiescence of the owner. [6 Pet. Rep. 439; 3 Bing. R. 447.] But a dedication by the owner of the fee, would confer no right on the corporation to the fee of the soil; in respect to such a street its rights would be the same as if it had been opened in the exercise of corporate powers, and no greater. In the present case, the corporation has taken a part of the shore which we have seen was otherwise disposed of by the compact between the United States and this State—this act was clearly unauthorized, and violative of other rights. The State could not confer such a power.

A riparian proprietor has a vested right to go to the water, and neither the United States, or the State, can exclude him from it, by making wharves, &c. [8 Porter's Rep. 34; Ang. on Tide Waters, 161-2.] The fee in the soil of a highway belongs to him who would have been its proprietor, if it never had been thus appropriated. [6 East's Rep. 154; 1 Burr. Rep. 134, 443; 1 Wils. Rep. 7; 8 Porter's Rep. 33; 2 Mass. R. 127; 2 Johns. R. 363; 15 Id. 447.] And the law is the same, though the ground was covered with navigable water until it was used as a highway. [7 Metc. R. 39; 1 Sumn. R. 21.] If, when St. Louis street was dedicated to the public, in 1817, or 1818, the Kennedy's had parted with their right to all the adjacent land, perhaps, they would have no claim to the fee of the soil of the street; but this is denied. The proof however shows, that they retained, and their representatives still are proprietors of the adjoining lands. The cases cited by defendant's counsel from 4 Mart. Rep. 97; 4 Wend. Rep. 22, do not conflict with the view taken by the plaintiff. [See 6 Pet. Rep. 431, 498.] Although the use of the soil may be shown to belong to the public by dedication, yet the fee could not be transferred according to the Spanish law, otherwise than by grant. [10 Pet. Rep. 723.]

It does not appear when St. Louis and other streets were opened—if it was previous to the treaty of St. Ildefonso, then the United States would have acquired the fee subject to the easement; and the confirmation of the title to Joshua Kennedy, would have transferred it to him. There was no proof of any grant by Spain, of St. Louis street to the city, as property. The concession made to Collins in 1803, calls for that street as one of its boundaries—but this was a grant to an individual, and not to the city. In 1813, when the Spanish government ceased to exist at Mobile, St. Louis did not extend east of Royal street; even as late as 1824, the tide flowed half way from water to Royal street. If the land granted to Collins could be identified by other objects, the grant would not be void for uncertainty; but if the Spanish government made a grant to the city, of St. Louis street, without any description of the course of it, or of any thing else to identify it, the grant would be void for want of pow-

Doe ex dem. Kennedy's Ex'rs v. Jones.

er in the government to grant the fee of the soil, as well as for uncertainty. [10 Pet. Rep. 331; Id. 182.] The recital in a deed from Wm. E. Kennedy to Innerarity, for one half his interest in the Baudin claim, which was a Spanish concession, made in 1798, that it was bounded by St. Louis street, does not prove the existence of the street at that time; but merely referred to it as it existed at the date of the deed, in 1820. If, however, the recital affirmed the existence of the street in 1798, it would prove nothing; for the uncertainty of its location made it impossible to identify it, except as to the distance from St. Josephs to Royal streets—and then only by a reference to other objects. After the treaty of St. Ildefonso, Spain could not grant the fee in Mobile, or dedicate the soil to a street; there is no proof of a perfect grant having been previously made, and if there was an incomplete one, or a mere easement, it should have been presented for examination according to the acts of Congress, and confirmed, to entitle it to be considered as evidence. [12 Pet. 454; 3 How. Rep. U. S. 55; 2 How. R. 603, 351; 6 Pet. R. 513.]

St. Louis street, up to 1817, or 1818, when Matthews drew the map for the Kennedy's, was only used from St. Joseph's to Royal street—and it was at that time, and in that manner, that the first dedication was made of it east to the river. Subsequent to 1798, when the grant to Price was made, the Spanish government could not have made a valid dedication, because the soil was granted to Price.

In 1814, the town of Mobile surrendered her corporate powers derived from Spain, and if she previously had the capacity to hold the soil of streets in fee, she then yielded it up, and retained nothing more than an easement. The fee from that time, if indeed the corporation held it, was abandoned to the United States to be sold or transferred by confirmation, as other parts of the public domain.

A title derived from the United States cannot be impeached at law where the Government had a right to grant and the officer who issued the patent was authorized to issue it. [9 Cranch's Rep. 99; 13 Pet. Rep. 436; 2 How. Rep. U. S. 318; 3 Ala. Rep. 47.] In the case cited by the defendant's counsel from 2 How Rep. U. S. 597, the court gave no opin-

ion upon the point whether it could be shown against the confirmation of a complete Spanish grant that it had been fraudulently obtained. A confirmation by Congress admits that the equitable title was valid, was created at the time it imports, and was held by the United States or Spain in trust for the person entitled to the equity. [12 Pet. Rep. 484; 2 How. Rep. U. S. 344; 7 Ala. Rep. 900.] The patent then to Kennedy and the survey, as they bound the land according to the Spanish grant and plat, give him a legal claim to all the riparian rights to which he would have been entitled, if that grant had conveyed both the legal and equitable estate. One of the boundaries was the river Mobile, and this carries with it all accretions from the receding of the water; the more especially as the confirmation occurred before the United States had granted any of the land included within the grant by Spain. [See 5 Ala. Rep. 392.]

The confirmation to Kennedy is retrospective, and gives him all the rights to which the Spanish grant would have entitled him had it conveyed a perfect title in itself. [3 How. Rep. 57; 7 Ala. Rep. 900.] The act of Congress of 1824 conferred no right upon the city to the premises in question, and thus far is void. [3 Ala. Rep. 51; 3 How. R. U. S. 212.] Besides, the claim of Kennedy is by the terms of the act excepted from its influence. [16 Peters' R. 263.]

We may consider the confirmation of Kennedy's title not only as a legislative grant, but an act of Congress. [7 Ala. Rep. 900; 6 Cranch's Rep. 88; 2 How. Rep. U. S. 372; 3 id. 57;] and it cannot be enlarged or restricted by the patent and survey consequent upon it. If these embrace too much land, they will be *merely void as to the excess*; if they do not include enough, the grantee's rights will not be affected. [8 Ala. Rep. 930.]

Questions arising upon the presentment of an incomplete Spanish grant for investigation with a view to confirmation, however decided, are not regarded as definitively settled, unless they are adjudicated by some court invested with the right of decision in the particular case. But Congress, in virtue of the political obligations of the Government, may examine all the evidence and act finally upon it—whatever be its conclusion, it is not revisable by any tribunal. [2 Pet.

Rep. 307; 6 id. 735; 7 id. 240; 10 id. 326; 2 How. Rep. U. S. 345; 3 id. 706, 751, 761.] Congress, in the exercise of the duties devolved upon it by the treaty, has confirmed the "Price Grant," and thus placed it beyond its power to annul or impair the confirmation quite as much as if it had been recognized by the treaty itself. [2 Stew. Rep. 413; 5 S. & P. Rep. 40; 1 Ala. Rep. 660.]

Complete Spanish grants, not expressly confirmed by the treaty, confer rights which are protected by the treaty and the law of nations; and when such rights are asserted against the United States, by one holding under the United States, or another complete grant, it is permissible to resist them by proof that the grant was fraudulent only in the same manner that patents from the Government may be assailed. The case cited from 3 How. Rep. U. S. 762, 787, to show that the invalidity of an incomplete Spanish grant may be inquired into after confirmation, was a case in which the United States had never confirmed the grant.

The circuit court erred in referring to the jury the inquiry whether there was a grant of St. Louis street, or a dedication of it to the city by Spain. [4 Porter's Rep. 331.]

J. A. CAMPBELL, for the defendant in error. Some of the ancient writers on the civil law teach, that, if an alluvion is formed upon the edge of a public road, it belongs to the proprietor who is separated from the river by the road. But this rule, if it obtained any where, proceeded upon the ground that the repair and support of public roads were at the charge of those through whose lands they passed; so that, if a portion became impassable or was destroyed by water, the contiguous proprietor was bound to furnish from his domain the land necessary for a passage—it was just, as the owner was subjected to the inconvenience, that the benefits of a riparian proprietor should be secured to him. Where public roads are on ground purchased of the proprietors, or the adjacent land holden is not chargeable with their repair, the law is said to be otherwise. [*Chardon droit d'Alluvion*, 264, *et seq.*] Who has opened St. Louis street and improved it? Who is bound to continue it in a passable condition, and whose loss would it be, if injured by an irruption from the river? An

answer to these questions will show that the dedication of a street in a growing city is to place it under the municipal authority, to be used according to a sound discretion for the public benefit. Has the city in the present instance abused or unwisely exercised its power? Unless the lease had been given, it is probable the improvement could not have been made. Was it not a matter proper for the Mayor and Aldermen of the city to consider whether they should allow the *locus* of the street to remain a marsh, or to have it filled up, and grant a water privilege. The 566th article of the code declares that one whose land is separated from the bank of navigable water by a public road shall profit by alluvion. This we have seen was the Roman law, founded upon reasons already stated, and which do not obtain here. In France it is said that the *state* or *commune* who have need of a road are obliged to purchase and pay for the lands needful, and it thus becomes their property; the alluvion formed on the opposite side from the private proprietor belongs to the *state* or *commune*, which suffers from the inconvenience incident to a boundary upon a water course, from inundation, &c. [1 Gornier, regime des eaux, 240.]

The city of Mobile is occupied by those who succeeded to the estates of the Spanish inhabitants; whatever had been dedicated to the use of the people residing in the Spanish town, devolved upon the American city. [See Toulm. Dig. of Ala. 780-1, 791.] The evidence of St. Louis street consists of records of more than forty years' standing, referring to the street as then in existence—with these the Kennedys are directly connected, as claiming under them and describing them. Old deeds made, calling for this street as a boundary, were also adduced, together with a map made by the Kennedys twenty years before the institution of this suit, and proof that the corporation made improvements on the street as early as 1822. In 1824 an act of the Legislature was passed which established a map of the city, on which St. Louis street is noted—in 1830 the street was extended and enlarged, and in consideration thereof, the lease to the defendant was executed, under which he enjoyed without molestation up to the close of 1837. The jury have

found that this street was dedicated to the public prior to 1800; and this we have seen was sufficient to entitle the corporation to the alluvial formations according to the French and Spanish laws.. [4 Mart. Rep. 97; 10 Pet. Rep. 723 *et seq.*]

The plaintiff concedes that he has no claim on the street, and submits to the evidence of dedication as conclusive against the title of his lessor. We deny, then, that any infringement of the *public right* by the defendant can entitle the plaintiff to divest that right entirely; if we use or abuse it, the public can complain. [6 Wend. Rep. 651; 19 Pick. Rep. 445; 6 Pet. Rep. 431, 498; 10 id. 662, 723; 4 Mart. Rep. 97.] The use of the street merely to sustain a wharf is not an infringement of the public right to the street. [4 Wend. Rep. 9; 6 Pet. Rep. 498.] In 18 Louisiana R. 278, it is said that the use of the batture outside of the levee is vested in the public, but the ownership or title to the soil is vested in the proprietors of the front lots, or the land to which the batture attaches or forms. That the corporation or municipality is the administrator of the *use* of the batture for the public, outside of the levee, and have the right of taking earth for the construction of embankments, levees and wharves for the public use, on the batture, along its whole extent within the corporate limits of the city; and also for improving the port and the streets and avenues leading to it. The city of Mobile has the power to regulate the *mooring and anchorage of vessels*, and to widen, extend and regulate the streets, lanes and alleys. Here is an ample authority to make the lease to the defendant; and the declaration shows the character of the property, which the plaintiffs are seeking to recover.

In the City Council of Lafayette v. Holland and others, 18 Louis. Rep. 286, it was decided, where the plan of a faubourg exhibits a front street called "Levee street," running parallel with the Levee, but leaving a space between on which no specified number of feet are marked, and without any particular designation on the plan, it will be presumed to be dedicated to the *public use*, and required to be kept open and free for that purpose. The circuit court in the case at bar ruled that under the American law, the erection of a

wharf entitled the owners of the fee in the street to maintain ejectment ; but according to the Spanish law, the action was maintainable : hence it is, that the question is presented as a dedication made prior to 1800. But the record shows that at the termination of a public street a wharf has been erected under the authority of the corporation, and we think it has been shown that a wharf built under such circumstances cannot be recovered by one who has dedicated the street.

In the *Mayor of New Orleans v. Metzinger*, 3 Mart. Rep. 296, it is considered a clear principle of law that public places, such as roads and streets, cannot be appropriated to private use ; and there was no doubt, that, if the Government which was the previous proprietor of Louisiana had given away such places to individuals, such grants might be declared void.

The confirmation to Kennedy only passed the interest which the United States had in the land in 1829—previous to that time the United States had parted with its right in the shore to this State, and the corporation of Mobile. Such a confirmation was inoperative as it respects the property in question. [2 How. Rep. 34 ; 7 Ala. Rep. 554, 882 ; 2 id. 909, 930.] It expressly excepts all pre-existing titles, and the city of Mobile is in a situation to contest the plaintiff's right—asserting as it does, a title under the act of Congress of 1824, and by dedication from Spain, which comes within the exception. [9 Cranch's Rep. 87 ; 11 Wheat. Rep. 380 ; 2 How. U. S. Rep. 591 ; 3 id. 773 ; 9 Pet. Rep. 225 ; 8 Por. Rep. 9.]

The patent from the United States is conclusive as to the extent of the land to which the plaintiffs' lessors are entitled. The confirmatory act gives the authority to the register and receiver to locate and survey, and authorizes a patent to issue. This perhaps might not be obligatory if the lands had been surveyed under Spanish authority, and could be identified. If, however, the grantee submits to the survey and location, and takes from the United States a grant according to that survey and location, he is estopped from claiming a different boundary. Here the patent was offered as a muniment of title, thus admitting that it correctly described the land. [7 Johns. Rep. 242 ; 12 Johns. Rep. 357 ; 17 Johns.

Doe ex dem. Kennedy's Ex'rs v. Jones.

Rep. 29; 12 Wend. Rep. 44, 59; 23 Pick. Rep. 91; 3 How. Rep. U. S. 773; 2 Hill's Rep. N. Y. 219; 13 Excheq. Rep. —; 6 Ala. Rep. 738; 4 Cond. Louis. Rep. 650; 13 Pet. R. 490.]

Upon the body of the testimony showing a connected series of recognitions extending back forty years previous to the trial, a dedication of the street may be fairly inferred. In such cases, especially of long standing, great latitude is allowed in making proof. [1 Greenl. Ev. 166; 6 Pet. Rep. 328; 7 id. 554.]

In respect to the argument for the plaintiff in error, it may be first remarked, that the validity and existence of the grant was admitted in the *Mayor, &c. v. Hallett*, 16 Pet. Rep., and that the only question there decided is, that a grantee under the Government of Spain has a better title than the corporation under the act of 1824. The assumption that the confirmation is an acknowledgement that the grantee has a good title, even from its incipency, and completes it just as if it had been perfect by the act of the preceding Government, must be received with much restriction. [7 Ala. Rep. 882; 8 id. 930.] It is only true upon the concession that the land remains the property of the United States, and the confirmation is absolute and unconditional. In the present case, the property had passed from the Federal Government by the admission of Alabama into the Union, and by the act of 1824.

It is a matter of no consequence whether the United States could grant the land covered by the shore or not—both parties derive title from the same source, and each must be held to have admitted the title of their common grantor. [8 Ala. Rep. 930.]

The argument that the dedication of a street to the city of Mobile would be void for uncertainty, cannot be supported. It is competent to establish the boundaries of a private lot by the deeds of adjacent proprietors, and much more so the location of public property. [6 Pick. Rep. 158; 6 Pet. Rep. 328; 7 id. 554; 8 Ala. Rep. 279.] The fact that the street was not open is no objection to its dedication. Matthews' Map lays down the street; besides, in a city more than one hundred years old, its existence may be presumed

for an indefinite period, and this presumption is strengthened by the other evidence in the cause. [See 10 Pet. Rep. 723.]

We have seen that the title set up by the plaintiff, was not confirmed until 1829, five years after the passage of the act of Congress in favor of the city; that the confirmation was a mere relinquishment of the claim of the United States, and could not so operate as to impair any previous enactment: *Further*, that the boundaries must be as defined by the patent and survey, which are consequential to the relinquishment by the government, and that the Spanish grant to Price is not validated *ab initio*. [See 8 Ala. Rep. 909, 930.]

It was allowable to attack the grant by Spain, either for fraud, or because it was made by one who had no authority as an officer to make it. [9 Cranch's Rep. 87; 11 Wheat. R. 380; 3 How. Rep. 773.] In conclusion, the defendant's counsel remarked, that the acts of Congress which give effect to Spanish grants, were expressed in different terms, according to the character of the grant—complete grants were recognized, incomplete ones were confirmed, either absolutely or conditionally. The confirmation of the "Price grant" was conditional. [7 Ala. Rep. 882.]

COLLIER, C. J.—On the 19th April, 1798, Thómas Price, the English interpreter residing at Mobile, petitioned Manuel Gayoso de Lemos, the Spanish Governor of Louisiana, for a tract of land having twenty arpens in front, by thirty in depth, bounded on the north by lands anciently the property of Terry and Mazurie; on the east by the granted lots in the town of Mobile, and by the river, and on the west and south by vacant lands. In aid of Price's petition, Manuel de Lanzos, the then commandant of Mobile, informed the Governor that the land thus applied for was vacant, the petitioner was a useful person, had been for several years English interpreter, and that there was no obstacle to his having a grant of the land. Thereupon the Governor, by a decree dated at New Orleans, the 18th November, 1798, directed the commandant to put the petitioner in possession of the tract, and to forward the proceedings of survey, for the purpose of procuring the petitioner a title in due form.

It is not shown that any further proceedings were had on

Doe ex dem. Kennedy's Ex'rs v. Jones.

the petition. In 1806, Price, through his agent, Joshua Kennedy, presented to Morales, the Intendant of Pensacola, a petition for five hundred arpens of land, in and contiguous to and within the then town of Mobile. Sometime afterwards, Price discovering his agent was mistaken as to the particular land desired, as well as to the terms on which he wished a grant of it, addressed a memorial to the commandant at Mobile, stating in what the mistake consisted: *Further*, that the Intendancy had granted out of the six hundred arpens conceded to him by De Lemos, a tract of twenty arpens to Wm. McBoy, and had also granted to F. Collell part of another tract belonging to the memorialist. Thereupon Price prayed a confirmation of the concession of 1798, and that five hundred arpens, lying to the south and west thereof, might be granted to him in payment of three years salary, due him as interpreter, and as compensation for the injury he had sustained by the grants to McBoy and Collell. The prayer of the petitioner was granted, on condition that he should never claim the lands held by McBoy and Collell, and his claim upon the treasury for his salary should be considered as extinguished. The Spanish surveyor general, Pintado, in his directions to the deputy at Mobile, recapitulates this latter concession to Price, approved the same, and ordered him to have a survey made, that a formal title might issue. [Am. State Pap. 5 Public Lands, 128.]

These facts, with others not necessary to be noticed, are set forth in "Special report No. 1," of the register and receiver of the land office for the district of St. Stephens, to the secretary of the treasury, on the 23d February, 1828. By an act of Congress of the 2d March, 1830, all claims to lands and town lots contained in certain abstracts reported to the treasury department by that register and receiver, under the provisions of the act of Congress of 1827, are confirmed to the extent therein recommended: *Further*, "that all the claims contained in special reports, numbered one to four inclusive, and in a supplementary report of the said register and receiver, made as aforesaid, be, and the same are hereby confirmed." The fourth section enacts, "that the confirmation of all claims provided for by this act, shall amount only to a relinquishment forever on the part of the United

Doe ex dem. Kennedy's Ex'rs v. Jones.

States, of any claim whatever to the tracts of land and town lots so confirmed, and that nothing herein contained shall be construed to affect the claim or claims of any individual, or body politic or corporate, if any such there be." It is provided by the fifth section, that the register and receiver at St. Stephens shall direct the manner in which all claims to lands and town lots in their district confirmed by this and former acts of Congress, shall be located and surveyed, having regard to the laws, usages and customs of the Spanish government on that subject, and also the mode adopted by the government of the United States, in surveying the claims confirmed by virtue of the second and third sections of an act of Congress, entitled "an act regulating the grant of lands, and providing for the disposal of the lands of the United States, south of the State of Tennessee," approved the 3d of March, 1803; and that so much of the fourth section of the "act supplementary to the several acts for adjusting the claims to land, and establishing land offices in the district east of the island of New Orleans," approved the 8th of May, 1822, as interferes with the power here granted to the register and receiver of the land office at St. Stephens, is hereby repealed. [Public Lands, ed. 1838, Part 1, p. 455.]

The proceedings upon Price's petition, in 1798, merely direct the commandant of Mobile to put the petitioner into possession and to forward the survey, that the title may be consummated. It does not appear that the survey was ever made, or that any further steps were ever taken to perfect his title until 1806. These proceedings then, were wholly ineffectual in 1800, when Spain relinquished her claim to the country west of the Perdido, and when it was subsequently acquired by the United States, under the treaty of Paris. It may be added that the concession by the Governor of Louisiana, was a mere gratuitous assent to the prayer of the petition, and gave nothing more than a permission to occupy the lands—the fee remaining in Spain, until the survey was made in due form, the fact communicated to the Governor, and the evidence of title furnished.

Previous to 1806, the United States had become the proprietor of Mobile, when the concession of 1798 was professedly confirmed. But even this latter act, though founded

Doe ex dem. Kennedy's Ex'rs v. Jones.

avowedly upon a consideration, did not complete the title—it contemplated a survey as a prerequisite to its consummation, and it does not appear to have been made, or that the Spanish authorities acted further in the matter. In this condition of things, the United States become the owner of the fee in the lands in question, under the treaty of Paris charged with a political obligation to validate the inchoate acts of the Spanish government, so far as they were binding in conscience. Price had no rights which an American court could recognize, but was dependent upon the bounty and justice of Congress for the establishment of his claim. These principles have been so often asserted both by this and other courts, that it cannot be necessary now to sustain them by a reference to authority.

If, in the *interim*, when Price's petition was acted on by the Governor of Louisiana, and the negotiation of the treaty of St. Ildefonso, in 1800, Spain had made a complete grant of the same land, it cannot be questioned but the grantee would have acquired a title paramount to the concession to Price. The bounty which the representatives of his Catholic Majesty, had undertaken to bestow, could have been withdrawn before his purpose was consummated. This being the case, conceding that the evidence does not show a dedication of the soil of St. Louis street to the use of the city, prior to 1798, or that the circuit court did not refer that question to the jury, and it may be asked whether it was not competent, subsequent to that period, for the Spanish authorities to dedicate to public purposes any part of the land embraced by Price's claim? This question, we think, must receive an affirmative answer. If such a dedication was made previous to 1806, the confirmation of the commandant at Mobile, does not abrogate it in express terms, or by a reasonable construction, even if it had been within the competency of the local authorities of Spain to grant a public highway, or to divest easements in which the town had a common interest. But we have said that the concession of 1806 was inchoate, and not entitled to judicial recognition until it was confirmed by Congress.

In the Mayor, &c. of New Orleans v. Metzinger, 3 Mart. Rep. 296, the defendant claimed a lot in the city of New Or-

leans under a perfect Spanish grant which had been recognized by the United States, which the plaintiffs insisted was part of the public highway, and therefore could not have been granted for private use, even by the king himself. The court said, "that public places, such as roads and streets cannot be appropriated to private use, is one of those principles of public law, which requires not the support of much argument. Nor is there any doubt, that if by a stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void." This decision is expressed in terms too explicit to require comment, and was made by a court in which the civil law, as applied in Spain, is recognized.

It has frequently been a question, both in England and this country, what is sufficient to constitute a dedication of land to the public use. In *Jarvis v. Dean*, 3 Bing. R. 447, it appeared that persons had for four or five years been in the habit of passing up and down a new, unpaved and unfinished street, which terminated in fields, where other houses were built. The jury affirmed by their verdict a dedication of the street to the public, and a new trial was moved for on the ground that there was not sufficient evidence to support it. It was said by the court of common pleas, that as the street "had been used for four or five years as a public road, the jury were warranted in presuming that it was used with the full assent of the owners of the soil;" consequently the motion was denied. See also, *Antones, et al. v. Heirs of Eslava*, 9 Porter's Rep. 527.

In the *President, &c. of the city of Cincinnati v. The Lessee of White*, 6 Pet. Rep. 431, the proprietors of the land on which the city has been erected, made and approved a plan of a town, on which certain ground was designated as a common for the use and benefit of the town forever, reserving only the right of a ferry. It was held that the right of the public to use the common in Cincinnati, must rest on the same principles as the right to use the streets; and that the dedication made when the town was laid out, gave a valid and indefeasible title to the city of Cincinnati: *Further,*

Doe ex dem. Kennedy's Ex'rs v. Jones.

there is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation.

It was said, that in such cases there may be instances where, contrary to the general rule, a fee may remain in abeyance until there is a grantee capable of taking, when the object and purpose of the appropriation looks to the future grantee in which the fee is to vest. But the validity of a dedication does not depend on this: it will preclude the party making the appropriation from reasserting any right over the land; at all events, so long as it remains in public use, although there may never arise any grantee capable of taking the fee. All public dedications must be considered with reference to the use for which they are made; and streets in a town or city may require a more enlarged use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country. But the principle, so far as respects the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. Property being thus set apart for public use, and enjoyed as such, and private rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and those who have acquired private property, with a view to the enjoyment of the use thus publicly granted.

The same doctrine is reasserted in *Barclay and others v. Howell's Lessee*, 6 Pet. Rep. 498, where it was also said, if the ground for which an action of ejectment is brought had been dedicated for a particular purpose in a city, and the corporate authorities appropriated it to an entirely different purpose, it might afford ground for the interference of a court of chancery, to compel a specific execution of the trust, by restraining the corporation, or by causing the removal of obstructions. But even in such a case, the property dedicated would not revert to the original owner. The use would still remain in the public, limited only by the condition imposed

in the grant. *Further*, an unmolested possession for thirty years, would authorize the presumption of a grant; and under some circumstances, a grant has been presumed from a possession short of the number of years required to bar the action of ejectment, by the statute of limitations. In some cases, a dedication of property to public use, as, for instance, a street or a road, has been inferred from an undisturbed use of it by the public for six or seven years. See also, *McConnell v. The Trustees of the Town of Lexington*, 12 Wheat. Rep. 582.

In *Renthorp, et al. v. Bourg, et ux*, 4 Mart. Rep. 97, it was conceded, that according to the common law, the owner of a tract of land over which a public road passes, retains the fee in the soil, the use of the road is in the public; but it was said, that the Roman law invested the public with a right to the ground itself, that this law is in force in France, was so in Louisiana, when the country passed under the dominion of Spain, and does not appear to have been modified by the latter monarchy. See also, 6 Pet. Rep. *ut supra*, 499.

It has been held, that in order to dedicate property for public use in cities, towns, and other places, it is not essential that the right to use the same shall be vested in a corporate body—it may exist in the public, and have no other limitation than the wants of the community at large. If buildings have been erected on lands within the space dedicated for public use, or grants of part of the same have been made by the power which had authority to make, and had made, a dedication of the same to public use; the erection of the buildings, and the making of the grants, would not disprove the dedication, nor would the vested rights of the public be affected by the grants. It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of a right in the power which issued it. For any thing appearing to the contrary on its face, it may be valid; but if the thing granted was not in the grantor, no right passed to the grantee. [*The Mayor, &c. of New Orleans v. The United States*, 10 Pet. Rep. 662.]

In the case before us, it does not appear whether St. Louis street was designated in the original plan of the Spanish town, Mobile, or whether it was dedicated by Spain, or some

individual proprietor of the land over which it passes, but it is described in a petition of Joseph Collins, dated in January, 1803, addressed to Orsono, the then commandant at Mobile, praying a grant of a tract of land, as one of the streets of the town. And Orsono in answer to this petition gives permission to Collins to occupy land on the flat, of which "St. Louis street" is described as the southern boundary. It is also recognized in a deed executed by Louis Baudin and others, and attested by Joshua Kennedy, in 1814; and again in 1820, by a deed attested by the same witness, and executed by Wm. E. Kennedy, as well as by the map prepared by Matthews, in 1817 or 1818, to say nothing of the testimony of witnesses in respect to its use by the public.

The evidence is quite sufficient to warrant the inference of a dedication, not only in 1803, but if necessary, for an indefinite period previous to that time. In respect to the admissibility of the evidence to this point, it may be remarked, that it was not questioned in the court below, and if it had been objected to, we think its competency entirely defensible. [1 Greenl. Ev. 166; *Antones, et al. v. Heirs of Eslava*, 9 Porter's Rep. 527; 6 Pet. Rep. 328; 7 Id. 554.] But if it were not permissible to intend a dedication previous to 1803, when Orsono gave to Collins a permission to occupy land bordering on "St. Louis street," we have seen that this act of the commandant, followed by a continuous use for such a number of years, would itself indicate a dedication, not inhibited by the concession of the Governor of Louisiana to Price, in 1798, and not annulled by the confirmation of the commandant at Mobile, in 1806.

In respect to the accretions at the eastern end of St. Louis street, or the reclamations by human effort, we think that they become a part of the street, as the city extended its limits eastward, across the marsh, towards the river; quite as much as much as if the extension had been embraced by the original dedication. The location of Mobile, the extensive flat between the channel and the bank of the river, over which the tide flowed, the deleterious effect upon health, and the hindrance to trade, doubtless suggested the idea at a very early day, of making reclamations from the shore, as the commerce of the city furnished inducements to such improve-

ments. This is but a reasonable and natural assumption, and authorizes the conclusion, that by dedicating the streets running east to the use of the town, and the public, to the margin of the shore, the marsh between the shore and the river was in like manner yielded up, as the wants of the community required its use. The cases cited from 6th and 10th Peters, are in harmony with this view, and we think is a necessary sequence from them.

The transfer of the possession of Mobile and the adjacent country from Spain to the United States in 1813 did not interfere with the rights of property, the plan of the town, or the right of its inhabitants to use the public streets as they previously had done. The right of use continued in the public and individuals in the same manner as it was enjoyed prior to the change of national flags—and we have seen that to perpetuate the dedication, it was not necessary that there should have been a continuous corporate existence of the town: If, however, the law were otherwise, it would be worthy of inquiry whether the dedication is not inferrible from the use of the street with the assent of the parties interested since 1814, when the town of Mobile was incorporated by the Mississippi Territory? We say with the assent of the parties, because their dissent is not shown or pretended.

But conceding that the fee of the soil appropriated to the street, is vested in the plaintiffs, and it may be asked if it was not competent for the corporate authorities of Mobile to have erected a wharf or other convenience for the mooring or anchorage of vessels at the eastern *terminus* of the street? If the corporation could have done this, and demanded wharfage or other kindred charges, what inhibition is there either in law or reason to prevent it from leasing to an individual the privilege of erecting a wharf with a license to receive these charges upon the payment of a yearly rent to the corporation? The view we have taken of the evidence of dedication relieves us from the necessity of answering these questions.

Again: If the ground has been used for a purpose not contemplated by the dedication, will such an abuse of the right invest the plaintiff with the right to the possession of the part thus diverted from the purpose to which it was des-

Doe ex dem. Kennedy's Ex'rs v. Jones.

tined; or must not a court of equity be resorted to, "to compel a specific execution of the trust by restraining the corporation, or by causing the removal of obstructions?" In the *City of Cincinnati v. White's lessees supra* it was said that the mere naked fee will not entitle the plaintiff in ejectment to recover the possession of land. This is a possessory action, and to authorize the plaintiff to recover, he must have *the right of possession*. Whatever takes away this right of possession, will deprive him of the remedy by ejectment. It is abundantly shown by what has been said, that there is no error in the first charge given—certainly none that could have prejudiced the plaintiff.

The second and third charges we think are alike unexceptionable. If it could have availed any thing in the defence, it was permissible for the defendant to have shown that the grant to Price was made by Joshua Kennedy or some one else not authorized to grant the land embraced by it. [Polk's Lessee v. Wendal, et al. 9 Cranch's Rep. 87; Patterson's Lessees v. Winn, 11 Wheat. R. 380; United States v. King, et al. 3 How. Rep. 773.] If the grant was made without the authority of Spain acting through its officers, it was certainly void; and the plaintiff could only claim under the act of Congress and the consequent proceedings. The act merely confirms the special report in respect to the *Price claim*; but neither the act nor the report designate its limits or boundaries. In this posture of the case, reference must be had to the survey made under the authority of the fifth section, or to the patent in which it is recited. If the survey ascertains limits which do not embrace St. Louis street, or the shore east of it, we cannot see how the plaintiff can claim the property in question as a riparian proprietor. But if the court had misapprehended the law in the second and third charges, it may be asked if the plaintiff could have been prejudiced, as he failed to make out a title on which he could recover.

The view taken is decisive of the cause—and we have only to add, that the judgment of the circuit court is affirmed.

HALE, ET AL. V. BROWN.

1. When an overseer is charged with the collection of accounts contracted with his employer's smith shop, the opinions of witnesses of the annual value of the work done is not evidence to show a set-off to a suit by the overseer, as he is chargeable only for the monies actually collected.
2. A debt due to two carrying on a smith shop jointly, and collected by an overseer, may be set-off by the administrators of the survivor to a suit against them in their representative capacity, by the overseer on a note made by the survivor; but the presumption arises that the debt was settled when the survivor afterwards gives his note to the overseer, and the judgment will not be reversed when the claim is rejected as a set-off, but is admitted to shew fraud in the settlement, and the verdict negatives the fraud.
3. There is no distinction between the capacity required to make different kinds of contracts. A legal capacity to make any contract, is a capacity to make all contracts.
4. When a note is taken from a person of weak intellect and an habitual drunkard, under suspicious circumstances, it is a strong badge of fraud, if the plaintiff does not make out a fair case, and good consideration— it being previously shewn, the note was given on a settlement of accounts, and the presumption created, either that nothing, or a less sum was due than the note called for.

Error to the County Court of Dallas.

ASSUMPSIT by Brown against Hale and others, as the administrators of William C. Woods.

The declaration counts on a note made by the intestate on the 29th June, 1840, for \$2221, payable one day after date to the plaintiff, or bearer, and also to recover \$3000, alleged to be due for work and labor, &c. The defendants pleaded non assumpsit, set-off, statute of non-claim, statute of limitations, and other pleas. The suit was commenced the 26th of June, 1842.

At the trial the plaintiff put in the note described in the declaration, as well as evidence to prove his demand for work and labor. The defendant then introduced a witness, who testified he was acquainted with the intestate from boyhood

until his death, which took place in October, 1841, at the age of 26 years. He had an elder brother who died in August, 1839. These brothers inherited from their father a large fortune, containing a large number of slaves. No division of the property was ever made between the two brothers, but all was held jointly. The plantation was carried on by the two brothers until the death of the elder, and was afterwards kept up with the same hands by the survivor until his death. Attached to this plantation was a blacksmith and waggōn-making shop, which did the work of the neighborhood, doing a large and profitable business. It was conducted by slaves, the principal one having been purchased by the elder Woods, and others afterwards learned the trade. During the life-time of the elder brother he conducted all the affairs of the plantation—the younger brother taking no part—he having contracted habits of intemperance at 16 years of age, and they continued until his death. During the last five or six years of his life he drank very hard, and drinking made him habitually dull and stupid. He was naturally of feeble mind, and made but little progress in learning when at school, and the witness scarcely ever saw him sober for the last three or four years of his life. He had no capacity for business when under the influence of drink, and when so had a stupid look, and seemed insensible to things around him. He was incapable during the last few years of his life of doing any business of importance. His business was managed and attended to by agents.

Another witness testified that the intestate, from his habitual intemperance, was entirely incapable of transacting any serious business whatever during the last years of his life, but more especially during the summer of 1840. That the plaintiff was his overseer, and had the collection of the money due to the shop during the whole period he was in the intestate's employ.

Another witness testified that he attended and managed the business of the intestate, except that connected with the plantation under the management of the plaintiff—that the intestate resided in Selma at the distance of some 30 miles from his plantation—that in the summer of 1840, the precise

time he did not remember, the witness, on entering the house where he resided with the intestate, found him and the plaintiff seated at a table with a number of papers, and seemed to be engaged in some sort of business. The intestate was then very drunk but did not stagger. As soon as the witness entered, the plaintiff in apparent confusion and haste, took the papers from the table, and put them in his hat. After this, all three went into an adjoining room, where the witness saw liquor and glasses, and the intestate and plaintiff drank; this was near the hour of dining, and after dinner the witness left the intestate and plaintiff together. Witness never knew of any indebtedness, or reason for any indebtedness from the intestate to the plaintiff, except for his wages as overseer, and believes if any other had existed he would have known of it. The witness also stated his belief that the plaintiff knew that he and another person were the agents for the intestate, as it was published in the Selma paper. The plaintiff told this witness that he had one year sold for the intestate 2000 bushels of corn. This witness also testified that the intestate was for some time at the Universities of Alabama and Virginia.

Another witness testified that he with the one last named, were the general agents of the intestate—that the plaintiff never applied to him for any settlement or set up any claim against the intestate—that the intestate called at the witness' office in Selma, and asked for blank notes, stating he was going to his plantation to have a settlement with the plaintiff—witness then filled up the date of a note, and inserted the name of Brown as the payee, and handed it to the intestate, but did not insert the sum. He did not know whether the intestate went to his plantation on the same day—that the intestate was sober when he called for the notes, and when in this condition, in the judgment of witness, was capable of making ordinary contracts.

Another witness testified that the plaintiff commenced overseeing for the Woods in the spring of 1833; that he stated to witness he was worth nothing then, and was \$1200 or

\$1300 in debt. He continued as overseer until the end of 1841.

Another witness stated that when the plaintiff left the plantation of Woods in 1842, he owned 260 acres of good land, for which he owed \$1500 ; it cost twelve and an half dollars per acre for part, and fifteen dollars the remainder ; also fourteen horses and mules, and a jack ; six grown negroes, a negro woman, and several children, with some other property, estimated in value from nine to ten thousand dollars. The plaintiff kept his horses at Woods' plantation. Woods' hands cleared fifty acres of the land belonging to the plaintiff before he owned any slaves, and afterwards aided him to clear thirty acres more, but after the plaintiff became the owner of slaves, they were seen at work on the intestate's plantation.

It was also in proof by several witnesses, that they had paid the plaintiff for work done at the shop on the plantation of the Woods'.

Another witness stated, the plaintiff told him after the death of the elder Woods, that his wages were paid out of collections made by him from the shop, and that in one year besides paying himself his wages, it had made the elder Woods as much as \$1500 collected for smith's work.

Another witness stated, that he as *administrator ad colligendum*, called on the plaintiff after the death of the intestate, and he then said he had notes and accounts to the amount of \$1600 for work done in the shop. These were left in his hands. He then said the estate owed him for wages, but did not state the sum, and also for 540 bushels of corn. He also stated he owed the estate for blankets, negro clothing, shoes, and bagging, used by him in the life-time of the elder Woods.

The defendants then put in evidence three account books, all in the hand-writing of the plaintiff, two of which consisted of entries of charges against the customers of the shop for work done there, and the other containing entries of the amounts of monies received or collected on the accounts charged on the two first mentioned—from whom collected—to whose account credited—and in what manner the same was disbursed, and by whom. The said books run through several years down to the period when the plaintiff left the plan-

tation. From this book the plaintiff appeared to apply receipts sufficient to pay his wages annually as overseer, down to the year 1841.

In the course of the examination of some of the witnesses for the defendants, who had been customers of the shop, as to the sums paid by them to the plaintiff, they stated the shop appeared to have a good custom, and during a part of the life-time of the elder Woods was crowded with business; that it was carried on with one forger and two hands; that there appeared to be as much work as the two hands could perform. The defendant then proposed to ask witnesses to state their opinion what a smith's shop in that neighborhood under similar circumstances would make per year, but as these witnesses were not blacksmiths, the court refused to permit the question to be answered. It was also shewn that the notes and accounts in the hands of the plaintiff when the conversation was had with the administrator *ad colligendum*, amounted to \$1600, part contracted in the life-time of the elder Woods, and part afterwards, and were demanded from the plaintiff, who refused to deliver them until he was paid.

When the evidence was disclosed of the joint ownership of the property by the Woods', and their joint interest in carrying on the plantation, it was offered under the plea of set-off, and the court excluded it on the objection of the plaintiff. The defendant then proposed to offer it to show the want of consideration for the note, insisting that was given for services as overseer during the continuance of the joint interest, and that the same were fully paid for by collections made by the plaintiff. The court permitted the evidence to go to the jury, to show fraud and imposition in obtaining the note.

The plaintiff, in conclusion, offered evidence tending to shew the intestate was capable, when sober, of attending to business, and that he was so about the time the note was dated.

On this state of proof the defendants requested the court to charge,

1. That if the intestate, at the time he gave the note, was so intoxicated as to be incapable of business, then it was void.
2. That if his mind was naturally weak, and at the time

the note was given was so much weakened and destroyed as to render him incapable of making such a contract, in that event the note was void.

3. That if the plaintiff took advantage of the intestate's weak and drunken condition, and obtained the note by fraud, then the note should be wholly set aside.

4. That even if the plaintiff practised no fraud, and the intestate was of sound capacity, yet if nothing was owing when the note was given, then there was no consideration, and the jury should set it aside.

5. That, if during the life of the elder Woods, the plantation and shop was conjointly used and carried on for the joint account of the brothers, and that the intestate was the survivor, then that any debts which the plaintiff collected and owed them on that account, are subjects of set off in this case.

6. That if the money was received on accounts of the shop after the death of the elder Woods, it is a good set off, although the work was done in his lifetime.

7. That all moneys received for work done or corn sold since the death of the elder Woods, are good sets off, and should be allowed in this case.

8. That if there was no indebtedness of the intestate to the plaintiff, and no consideration for the note, it should be set aside.

9. That if the note was obtained by fraud or imposition, it was void.

10. That if on the whole proof, they should believe the plaintiff was indebted to the estate on account of the matters allowed as evidence of set off, they must not only find for the defendants, but certify the balance.

11. That although the moneys collected in the lifetime of the elder Woods was not good as set off, yet if they were received by the plaintiff in payment of his wages, and his wages were so paid, then that such receipts in the lifetime of the elder Woods and since his death, were good as payment of his wages.

12. That if the intestate's mind was naturally weak, and had at the time the note was given been so much weakened and destroyed as to render him incapable of making a con-

tract such as this, with understanding and judgment, that it was incumbent on the plaintiff to show, the note was given for a good consideration.

13. That if the intestate was incapable of making a contract when drunk with reason and judgment, and was generally and habitually in that condition, then it was incumbent on the plaintiff to show he was not drunk when the note was executed.

14. That the giving of a note is not necessarily binding, but is of no effect when it is shown to be without consideration, or if it is shown it was obtained by fraud, or if it appears the person giving it was not in a situation to give a note with understanding and reason, from drunkenness or any other cause.

15. That if the note was given under suspicious circumstances, and when the intestate was in a weak and drunken condition, it is a strong badge of fraud if the plaintiff does not make out a fair case, and show a good consideration.

16. That as to the consideration of the note, and the intestate's condition, when he gave the note, it was unnecessary for the defendants to produce any positive evidence, provided they show facts and circumstances sufficient to convince the minds of the jury.

These were all given, with the exception of the 2d, 5th, 6th, 12th, 13th, and 15th.

At the request of the plaintiff, the court charged—

1. That there is no medium between capacity and incapacity to make a contract—that a legal capacity to make any contract, is a legal capacity to make all contracts, and that capacity is not governed by the importance of the contract to be made.

2. That there is no law which graduates the legal capacity by the particular contract made.

The defendant excepted to all the rulings of the court against him, except the refusal of the 13th charge, and to the charges given at the request of the plaintiffs.

WM. HUNTER, for the plaintiff in error, insisted—

1. The opinions of witnesses as to the annual value of the smith's shop, was proper evidence. This is not a question

of skill, as to which an *expert* alone can speak, but is evidence entirely independent of the act. [Kelly v. Kenson, 14 S. & R. 137.]

2. The evidence of set-off should have been admitted to the jury. The sole right of action on the demands was with the intestate, after the death of his joint tenant, or co-partner, and the charge refused in this connection should have been given. [Chit. Pl. 555; Collyer on Part. 448; Cary on do. 6, 133; Gow. on do. 168, 233, 173; Slipper v. Stidstone, 5 Term, 493; French v. Andrade, 6 ib. 582; Childress v. Emory, 8 Wheat. 669.]

3. If the mind of the intestate was so weak as to be incapable of making a contract, the cause of the weakness is immaterial, and the contract is void. [Story on Con. 23, 24, 27; Story on Notes, 101; 3 Stark. Ev. 1701, 1703; 3 C. & P. 1; Pitt v. Smith, 3 Camp. 33.]

4. The evidence fairly considered, raises grave suspicions as to the fairness of the supposed settlement, when the note was given, and it rested with the plaintiff to show an adequate consideration for the note, as called for by the 15th charge. [Chitty on Bills, 78, 83, note R.; Ib. 637, note W. a; 2 Philips' Ev. 8; Cowen & Hill's Notes to do. 18; Heath v. Samsom, 2 B. & Ad. 291; Bassell v. Dodgin, 10 Bing. 40; 4 Taunt. 114; Duncan v. Scott, 1 Camp. 100, 2 Ib. 574; Osmond v. Fitzroy, 3 P. Wms. 130; 2 Ib. 203; Stock. on Non Com. 18.]

G. W. GAYLE and E. W. PECK, contra, argued—

1. The evidence in relation to the set off, of the value of work done previous to the date of the note, was properly rejected; as that closed all accounts up to the date. [Cope-land v. Clark, 2 Ala. Rep. 388.] The evidence however was allowed in another aspect, and therefore worked no injury, as, until the note was set aside, there was no pretence to let in the set off.

2. The cause was properly submitted to the jury on the charges given; the 5th and 6th charges refused attempted to draw a distinction between contracts *such as this*, and other contracts, when the law makes no distinction in the capacity

Hale, et al. v. Brown.

to make different kinds of contracts. [McElroy v. McElroy, 5 Ala. 81; Parkman v. Ely, Ib. 346.]

3. The fact that a note would be void, if made when the intestate was drunk, imposed no obligation on the plaintiff to show he was sober. That he was so, is the legal presumption, and it rested with the defence to show it was otherwise. [Greenl. Ev. 91, § 80; Story on Cont. § 27; 5 Ala. Rep. 241.]

4. The note itself imports a consideration, and it was for the defence to show it had none to sustain it. The 15th charge was properly rejected. [Digest, 340, § 152; Chamberlayne v. Darrington, 4 Porter, 515; Clark v. McAfee, 7 Ib. 62; Young v. Foster, Ib. 420; Parkman v. Ely, 5 Ala. Rep. 346.]

GOLDTHWAITE, J.—1. From the facts stated in this bill of exceptione, the case evidently belongs to that class in which a jury is rarely, if ever, mistaken upon the merits, unless led astray by some misconception of the law which should govern it, and therefore their verdict ought not to be disturbed, when the error is not entirely apparent. Several of the charges refused by the court, as well as one of the matters ruled at the trial, may involve abstract error, but which, however, vanishes when the whole case is considered, except in one particular.

The first point insisted on by the counsel, for the reversal of the judgment, is, the exclusion of the opinions of witnesses with reference to the annual value of the work done at the smith's shop. Without debating how far the reason is sound, on which, apparently, these opinions were rejected, or whether in a proper case they might not be admissible, we are clear they were not so in this. If the annual value of the work was made to appear, there is nothing in the proof to make the plaintiff chargeable with it, except so far as collections were actually made by him, or the proceeds of the shop appropriated to his use. To this extent only could he be considered the debtor of his employers, and the sums could be shown by better evidence than ascertaining the probable annual value, and the showing of that, had no ten-

dency whatever to fix the sums received by the plaintiff. [Barker v. Sample, 6 Ala. Rep. 255.]

2. The connection between the brothers, in carrying on the plantation and shop, appears from the proof to have been in the nature of a partnership, and so considered, it is clear the survivor was in law entitled to the outstanding dues. The debts collected by the plaintiff, although accruing when both brothers were living, became the property of the intestate, as the survivor, and the sum collected was a proper matter of set off to an ordinary demand of the plaintiff. [Slipper v. Stidestone, 5 Term, 493; French v. Andrade, 6 Ib. 582.] And the rule is the same if the brothers are considered as joint tenants. [Chitty's Pl. 21, 77.] It is possible the court below took a different view of the law than this, though here we may be mistaken, as the proof rejected under the plea of set off, was let in to show fraud and imposition in taking the note. The abstract error, even if the court misconceived the law, was calculated to produce no injury, as the note, if fairly obtained, was entitled to be considered as the settlement of all outstanding accounts. [Copeland v. Clark, 2 Ala. Rep. 388.] The jury having found the amount of the note for the plaintiff, it seems they did not consider the fraud as established, and therefore we should not feel warranted in reversing on this ground, although satisfied that the law of set off was mistaken in the court below.

3. The 2d and 12th charges which the court refused, seem to indicate the impression of the defendants, that a distinction could be taken with respect to the legal capacity to make different kinds of contracts, for they expressly put the request with reference to *such a contract as this*. The impression is more obvious from the circumstance, that a different charge was given on this identical point. In this view, both charges were properly refused, as the capacity to make any contract, is so to make all contracts. [McElroy v. McElroy, 5 Ala. Rep. 81.] If *monomania* is to be considered as creating an exception to this general rule, it is sufficient to say, there was no pretext of that here.

4. Notwithstanding the strong disinclination we feel to send a case like this to a second trial, after what seems to us to have been a full examination of all the facts and circum-

stances of the transaction, we find it impossible to sustain the refusal to give the 15th charge as requested by the defendants. The note certainly imports a consideration, but in the nature of things, it is generally difficult, and frequently impossible, to prove the want of consideration, except by showing circumstances tending to cast strong suspicion of imposition, or mistake in the transaction. The *onus* of proving the note was without consideration, was on the defendants; but when a case is made by them, from which the inference is fair, that either no consideration, or one of a particular kind was at its foundation, the *onus* was then shifted to the opposite side, to sustain the note, by showing what the consideration was. It is said, that in the examination of a contested fact, the *onus probandi* may, in the course of the trial, be thrown from one party to the other several times, according as the complexion of the proof may vary. [Cowen & Hill's Notes, 475; Brooks v. Barrell, 7 Pick. 94.] A note is the statutory evidence of a debt, but not in its nature conclusive, or incapable of contradiction; it is therefore subject to be rebutted by any proof which satisfies the jury against it; and in our judgment, no rule can be more just, than one which requires the presumption of imposition, or mistake, to be rebutted by showing the real consideration for which the note was given. Even when the action is by an indorsee, and the note is shown to be without consideration, or a strong suspicion of fraud is raised, the plaintiff is required to support his title by showing the consideration paid by him for the note. [Marston v. Forward, 5 Ala. Rep. 347; C. & H's Notes, 477; 2 Greenl. 146, § 172.] It would be strange if a more liberal rule was extended to the original party. We are not called on here to weigh the evidence, or to express an opinion upon the preponderance of the one or the other scale, nor is it doing so to say, the defendant's proof made a *prima facie* case, that the only consideration for this note was, the sum due at its date, from the intestate to the plaintiff, on a settlement of the accounts between them. If this proof necessarily created the presumption, either that nothing was due, or a less sum than the note called for, these were suspicious circumstances, and if not rebut-

ted by showing another consideration for the note, certainly warranted the presumption of fraud, or, in the language of the request, was a strong badge of fraud, when connected with the fact that the settlement was made with a man of weak intellect, to say nothing of him as an habitual drunkard.

The refusal of this charge may have had a direct influence on the verdict. The court refusing to instruct the jury, that these circumstances of suspicion did not call on the plaintiff for rebutting proof, may have induced the impression, that the legal force of the note, as ascertaining the extent of the debt, was unimpaired. If the jury acted on this impression, they could do no otherwise than return a verdict for the amount of the note. We are not authorized to speculate, whether the verdict was found on the whole evidence before the jury, as the result we have stated may have been the consequence of the refusal.

For the error in refusing this charge, the judgment is reversed and the cause remanded.

T. J. & S. CLARKE v. GARY.

1. So long as the return of a sheriff is permitted to remain, it must be taken to be true for all purposes, both as it respects the sheriff, and parties claiming rights under it. Therefore, in an action against the sheriff for making an insufficient levy upon an attachment, he cannot show, that by the mistake of a deputy, a return was made upon the attachment, of a slave not levied on, and that in point of fact, a sufficient levy had been made.
2. If a deputy empowers a stranger to make a levy, and afterwards adopts it by his return, it becomes his own act.

Error to the Circuit Court of Sumter.

Clarke v. Gary.

Action on the case against the defendant in error, sheriff of Sumter county, for failing to make a sufficient levy, in a suit commenced by attachment, by the plaintiffs in error, against one Caleb B. Greenwood.

From a bill of exceptions taken at the trial, it appears, that the plaintiffs produced the writ of attachment, upon which was endorsed an authority to James M. Sergeant, to levy and return, signed with the name of the defendant as sheriff of Sumter county, upon which was a return, "Received 4th July, 1843. Levied same day, on one negro man named James, forty-five years old. Bond taken and herewith returned. M. E. Gary, Sheriff of Sumter county, by B. P. Brantly, D. S." Also a replevin bond, executed by the defendant, Greenwood, dated 4th July, 1843.

The plaintiff prosecuted his suit to judgment for \$318, besides costs, upon which an execution was issued, and the slave levied on sold, which, after deducting costs and sheriff's fees, left \$137 90 to be applied to the judgment, and a return of no property found as to the residue.

The plaintiff then introduced one Pinkard, who proved, that as the agent of the plaintiff, he placed the attachment in the hands of one Manasco, a deputy of the sheriff, on the day it issued, and informed him that Greenwood had property sufficient to satisfy it. That Manasco was unwell, but promised to procure some one to levy it, and did procure one James M. Sergeant, who was not a deputy of the sheriff, to undertake to levy it; and that W. J. Steele, one of the plaintiff's attorneys, wrote a deputation for Sergeant, at the instance of Manasco, who signed the name of the sheriff to it.

That Sergeant and the witness went to Warsaw, in Sumter county, on the same day, where the former pointed out two slaves, the property of Greenwood, either of whom were of value, more than sufficient to satisfy the attachment, and that it was levied on a slave worth \$700.

The defendant then introduced his deputy, B. P. Brantly, who testified that the return on the attachment was not by him, or by any one authorized to make it for him. That the return was made by one Thompson, who was at the time also a deputy of the defendant. That he never saw the attachment before, but that Thompson, a few days after it is-

sued, placed in his hands the replevin bond, and informed him that Sergeant had levied on a negro under an attachment, and he wished him to take a bond to Warsaw, and get it filled up. That he went and procured the bond in evidence, and inserted the name of the slave, James, aged 45. That Thompson was in the habit of making returns for him.

The plaintiff's counsel moved the court to exclude this testimony from the jury, upon the ground, that it contradicted the return endorsed on the attachment, which motion the court overruled. It was also in proof, that the hand-writing in the body of the bond, was that of Manasco, who sometimes acted as clerk for Thompson, and that Thompson, Manasco and Brantly, were all deputies of the sheriff, when the attachment issued, having their office at Gainesville. It was also proved, that Greenwood had four or five slaves, besides other property in the county, from the time the attachment issued, to the winter of 1844, when he removed with them to parts unknown.

The plaintiff's counsel then requested the court to charge, that if they believed from the evidence, that the return made and endorsed on the attachment, was made by the sheriff, or any deputy of his, that he is bound by the same in a suit against him, on the return, and cannot controvert it; which charge the court gave, with this qualification, that the sheriff, notwithstanding the return, would be permitted to show that it was made by mistake, or was a forgery, and that by mistake, the court meant that the sheriff could show, that Thompson had no authority from Brantly to put it there.

2. That where a return is made by the sheriff, or any deputy of his, he will not be permitted to falsify his return, or show that a different levy, or a levy on property other than that specified in the return was made: which charge was given with this qualification, that it is competent for the sheriff to prove that it was not his return, or any of his deputies, and to show that it was made by mistake, or was a forgery.

3. That if the attachment came to the hands of the sheriff, or any of his deputies, who without the request of the plaintiff, authorized any other person by special appointment in the name of the sheriff to execute it, that he was bound

by such appointment, unless he repudiated it, which he must show to excuse him from the consequence of such act; which charge the court gave with this qualification, that it must be shown affirmatively, that the sheriff had knowledge of such appointment, or that he would not be bound by the acts of the person thus appointed, but that they might infer that he had such knowledge, by the process being returned into court.

4. That in order to make the levy upon the attachment complete, the sheriff must in his return specify the property levied on, which was given with the qualification, that the sheriff might show that it was not his return, or was made by mistake, or was a forgery.

5. That the sheriff is estopped from showing in a suit against him, on his return, that he levied on other property than that shown to have been levied on by said return, and will not be permitted to give evidence in contradiction to his return; which the court gave with a similar qualification as the preceding. To all which the plaintiff excepted, and which he assigns as error.

METCALFE, for plaintiff in error.

HUNTINGTON, contra.

ORMOND, J.—We understand it to be a settled principle, that the return of a sheriff to process, cannot be contradicted. This principle has been carried so far, that it has been held, that the defendant could not be permitted to show, that a writ had not been executed, but was remitted to his rights against the sheriff. The only relaxation of the rule in this court, has been, to permit the defendant against whom a judgment had been obtained without service of process, or notice that the action was pending, to apply to a court of chancery for relief, provided he had a defence to the action, which from want of notice he was prevented from making. [Crafts v. Dexter, 8 Ala. 767.] In Figh & Blue v. Mead, 4 Ala. 279, it was held that a fictitious levy was binding, not only on the sheriff, but also on the sureties to a forthcoming bond; and that as against the plaintiff in execu-

tion, they were estopped from denying that such a levy had been made, and could not be relieved in chancery.

The sheriff may be permitted to amend his return, according to the truth of the case, provided rights acquired under it, are not thereby prejudiced; but so long as the return is permitted to remain, it must be taken to be true for all purposes, both as it respects the sheriff, and parties claiming rights under it.

This rule the court in terms admitted, by responding in the affirmative to the charges moved for by the plaintiff, in which it was asserted (but the admission so made was immediately neutralized by the qualification annexed to it) that it would not be binding upon him, if it was a forgery, or was made by mistake.

The sheriff is the executive officer of the court, and when he returns process to the clerk of the court, either in person or by his deputy, he cannot afterwards be permitted to aver it was not his act. It may be conceded, that if a stranger should personate the sheriff, and impose a false return on the clerk, in the name of the sheriff, it would impose no liability upon him; but as no such fact exists in the case, it was doubtless put by the court by way of illustration. The defence of the sheriff appears to have been, that by the mistake of one of his deputies, a return was made on the attachment of a negro not levied upon, which mistake was also carried into the replevin bond; but we are clear in the opinion, that this mistake, if it existed, could not defeat the rights of the plaintiff.

Let us look for a moment at the consequences to which such a principle would lead. The creditor takes out an attachment, which is levied on property amply sufficient for the payment of his debt. By the mistake of the sheriff, or his deputy, other property is substituted for that actually levied on, insufficient to discharge the debt, and before judgment can be obtained the debtor absconds with all his property. The creditor has done all in his power to do, by placing the process in the sheriff's hands, and the loss has been occasioned by his neglect of his duty. Surely it cannot be gravely contended, that it is a sufficient answer to the creditor, who has thus been deprived of the fruit of his judg-

ment, that the loss was occasioned by mistake. To charge the sheriff, it is not necessary to show *malfeasance*, it is sufficient that he is guilty of *nonfeasance*—that he has not made a sufficient levy; and whether this was caused by mistake, or accident, or was designedly made, is wholly unimportant. He cannot be controlled by the creditor, and necessarily acts at his peril: as between the sheriff and his deputies, doubtless these rules do not apply, and proof of a mistake might be made, so as to cast the consequences of a default upon the individual to whose conduct it was owing.

The testimony of Brantly should have been excluded from the jury, if for no other reason, for irrelevancy. Its purpose was to show, that Thompson had no authority to make the return in his name. It would seem that he had such authority, as it appears he was in the habit of doing so. But we consider it entirely unimportant, whether he had, or not, such authority, as the question here, is not, which of these deputies is liable to the principal sheriff, for the consequences of this act, but whether the sheriff is responsible to the plaintiff. Thompson and Brantly were both deputies of the sheriff; if therefore Thompson had authority to make the return in the name of Brantly, it is the act of Brantly, if he had not, it is his own act, and in either aspect it charges the sheriff, by whose authority the act was done. It could not be tolerated, that the rights of the plaintiff should be impaired by a controversy between these deputies, as to the authorship of an act, which if done by either, or both, would be alike binding on the sheriff.

As it respects the levy made by Sergeant, we do not think it necessary to inquire, in this case, how far the deputy of a sheriff, may empower another to act, because if the levy made by Sergeant, which was sufficient to satisfy the demand, was adopted by the deputy, who it appears went to Warsaw, to complete the levy by taking a replevy bond for the delivery of the slave to satisfy the judgment, it became his act, and the sheriff is responsible for the substitution of an inferior slave for the one levied on, and it is entirely unimportant whether this substitution was the effect of accident or design. If, on the other hand, he did not adopt the levy made by Sergeant, but made a new and substantive levy, the sheriff

is clearly responsible, it being shown to be insufficient, and that the defendant had ample means on which a sufficient levy could have been made. It may be added, that this last is the natural, if indeed it is not the necessary inference, from the return and the replevy bond.

From this examination it appears, that the court erred in the admission of the testimony of Brantly, and in the qualifications of, and additions made to the charges moved for by the plaintiff's attorney.

Let the judgment be reversed and the cause remanded.

DEAN, ET AL. V. PORTIS, JUDGE, &c.

1. When the demand of a creditor of the deceased has been presented to the administrator within the proper period, it is the duty of the latter to pay it as soon as the assets are converted into money, and he cannot discharge himself from liability by a settlement with the distributees, or by a decree of the orphans' court directing distribution. Where a judgment was recovered against an administrator, and an action brought thereon against himself and sureties, suggesting a *devastavit*, the sureties cannot defeat a recovery, by showing such settlement and distribution.
2. An action may be brought against the sureties on an administration bond, alledging that the administrator had wasted the assets; and this although the *devastavit* of the administrator had not been fixed in a separate suit but there was only a judgment against him *de bonis intestatis*.
3. *Semble*: In an action on the administration bond suggesting a *devastavit*, the sureties can only be charged to the extent of the assets actually wasted; but the jury need not ascertain by their verdict, how much was wasted.

Writ of Error to the Circuit Court of Clarke.

THIS was an action of debt at the suit of Portis, Judge of the county court of Clarke, for the use of Henry P. Brown, upon a bond executed by Dean, as administrator of the estate

of Richard Hopkins, deceased, and his co-defendants as sureties, for the performance of his duties. The cause was tried by a jury, on an issue which threw upon the plaintiff the burthen of proving the breach of the condition as alledged. A verdict was returned for the plaintiff, and judgment was rendered thereon.

From a bill of exceptions sealed at the defendant's instance it appears, that Brown recovered a verdict and judgment against Dean, as administrator of Hopkins, at the October term, 1843, of the circuit court of Clarke, for \$213 08, besides costs. On this judgment an execution issued on the 25th October, 1843, which the sheriff of Clarke returned "no property found," on the 27th March, 1844. The plaintiff gave in evidence the administration bond of Dean and his co-defendants as sureties—also, the inventory and appraisement of the intestate's estate, which show that Dean had received assets of the intestate to be administered of the value of nine thousand and twenty-four dollars. (We suppose it should be \$19,024.)

Defendants then offered the account of the administrator, with the final settlement and decree thereon by the orphans' court of Clarke, from which it appeared that he had received of the assets of the intestate's estate \$18,391 45; that he had paid certain debts, and that the surplus had been distributed under the decree. At the time of the final settlement and decree, the entire sum received by the administrator had been paid over by him; and he was by the decree fully discharged from his bond.

The decree was rendered while the suit of Brown against Dean was pending, but the debt to be recovered in that cause it did not appear was taken into the account upon the settlement.

The court charged the jury, that if the facts were as indicated by the evidence, the defendants were not entitled to a verdict, and they should find for the plaintiff. To this charge the defendants, who were sureties, excepted; and, condensing all the evidence, prayed the court to instruct the jury, that if they believed it to be true, then they were not liable on their bond to the plaintiff in this action. This prayer

was denied, and the jury were instructed, that if the suit of Brown against Dean, as administrator, was pending before and at the time the decree was rendered by the orphans' court, was not provided for, and was unpaid, then they should find for the plaintiff. The refusal to charge as prayed, and the charge as given, are duly reserved for revision.

F. S. BLOUNT, for the plaintiff in error, made the following points: 1. The judgment in favor of Brown against Dean was inadmissible; but if properly admitted, the bill of exceptions recites all the evidence, and it is insufficient to establish a *devastavit* against the sureties in the administration bond. 2. The verdict will not support the judgment in the present case—as it respects the sureties, it should have ascertained the extent to which the assets had been wasted. [6 Porter's Rep. 393.] An administrator, when sued alone, may be chargeable with a constructive waste; but his sureties are only liable on proof of actual *devastavit*. 3. The decree of the orphans' court, upon a settlement of the administration accounts, relieves the sureties from liability upon the bond; and they cannot be charged in consequence of the judgment and other proceedings against the administrator—these being matters of subsequent occurrence.

LESLIE, for the defendant in error, contended, that an administrator could not discharge himself from a debt due from the estate, by a settlement with the orphans' court. [5 Ala. Rep. 13.] And the liability of the sureties is coextensive with that of their principal. [Clay's Dig. 228, § 34.] The record shows, that assets sufficient to pay the debts sought to be recovered of the administrator, came to his hands, and that they were not thus appropriated; this entitles the plaintiff to recover of the sureties. [4 Ala. Rep. 359.]

COLLIER, C. J.—In Thrash v. Sumwalt, 5 Ala. Rep. 13, it was decided, that “an administrator is bound to a creditor of the intestate, in consequence of the assets which come to his hands to be administered; and a distributee has no claim whatever, until the demands of all creditors are satisfied, or legally barred.” He cannot therefore discharge

himself, or the assets, from liability to the creditors, by a premature settlement with the distributees, or by a decree of the orphans' court directing distribution. "When the creditor's demand has been presented within the proper period, it is the duty of the administrator to pay it as soon as the assets of the estate are converted into money." In the case at bar, the administrator made a final settlement of his accounts with the court, from which he received his authority, pending the suit of the creditor, and did not set up the decree thereupon in bar of the action; but it is now pleaded by his sureties in the administration, as an answer to an action upon the bond for the failure of the administrator to satisfy the judgment rendered in favor of the creditor.

We have seen that the decree rendered upon the distribution, would not have availed the administrator to defeat the creditor, if it had been pleaded, and his surety in a distinct but consequential action cannot derive from it any assistance. The judgment rendered in the primary cause cannot be opened by the pleading and evidence, and if the facts which have since transpired, show that assets came to the administrator's hands sufficient to satisfy the judgment in question, which have not been duly administered, then the ruling of the circuit court is correct. This conclusion, instead of opposing, is in harmony with the act of 1826, which declares, that "no security for an executor or administrator shall be chargeable beyond the assets of the testator or intestate, on account of any omission or mistake in pleading of the executor or administrator." [Clay's Dig. 228, § 34.]

In *Thompson, Judge, &c. v. Searcy and Fearn*, 6 Porter's R. 393, it was decided, that an action can be well maintained upon the administration bond, against the sureties, after the plaintiff's claim has been ascertained by judgment, upon an allegation that the administrator has wasted more than an equal amount of the goods and chattels of the intestate; and this even before a *devastavit* is fixed by judgment, in an action against the administrator, founded upon an allegation that he had wasted the assets, with the view of obtaining satisfaction of a judgment rendered *de bonis intestatis*.

In the case last cited, it was said, that the surety in the

bond can only be charged to the extent of the assets actually wasted ; and this was admitted to be the law in *Miller v. Gee*, 4 Ala. Rep. 359, where it was added that the jury need not ascertain by their verdict the precise extent of the *devastavit*. It was also said, that the law as thus stated, rests upon numerous adjudications, "and does not impose a peculiar hardship on the plaintiff, as he can always throw the burden of proof on the defendant, by showing the amount of assets which came into the hands of the administrator ; when this is once established, it rests with the defendant to show they have been lawfully appropriated." In the present case, it is not pretended that assets to a greater amount than the plaintiff's judgment did not come to the hands of the administrator—the proof recited in the record is full to this point. We have seen that the manner in which the assets were disposed of, furnish no answer to the action of a creditor of the intestate—the evidence establishes a *devastavit* in law, and of consequence, the sureties of the administrator are chargeable. From this view, it results that the court below laid down the law correctly ; the judgment is therefore affirmed.

CROSS v. WORRALL.

1. In an appeal cause, the judgment of a justice will not be reversed because the cause of action is not properly *indebitatus assumpsit*, when the action is for the violation of a contract, and the damages not excessive.

Writ of Error to the Circuit Court of Perry.

Cross was sued by Worrall before a justice of the peace, and being cast, appealed to the circuit court, where the cause was tried *de novo*, but with a similar result.

At the trial, it appeared that Cross, about December, 1845,

let Worrall have a mule to keep for its feed, until the fall of the next year. The mule was an estray, taken up by one Whitman, for whom Cross was attending a mill. Cross demanded the mule from Worrall about the middle of April, '46, and it was delivered. Worrall, when the contract was made, asked Cross what he should do in case the owner of the mule came for him, and Cross replied he had no idea the owner would ever come, as the twelve months had then nearly expired.

It was also in proof, that Cross admitted he had demanded the mule from Worrall contrary to the agreement, and in lieu of its fulfilment offered Worrall a bag of corn as compensation. This Worrall refused, saying he had fed the mule during the winter, when corn was scarce and high, and had received no benefit from its labor in his crop, and he must be paid for its feed. Cross, the defendant, was sworn as a witness, and stated that Whitman had directed him to let out the mule for its feed, and that the reason of his demanding it from Worrall was, that Whitman had demanded it from him. Worrall was also sworn, and stated that although he knew Cross was in the employ of Whitman, the latter was not known in the transaction, nor did Cross represent himself as acting as an agent for Whitman, and that he looked to him alone for the fulfillment of the contract. He kept the mule 103 days, but charged feed for only 72 days, at 25 cents per day. He also proved that Cross admitted the mule had never been called for by the owner.

On this state of proof, the court gave judgment for Worrall.

The defendant sues out this writ of error, and here assigns that the court erred in giving judgment for the plaintiff.

GARROTT and A. B. MOORE, for the plaintiff in error.

ALEX. GRAHAM, of Perry, contra.

PER CURIAM.—There is no room here to doubt the right of the plaintiff to a recovery. The contract was complete, that he should be allowed to keep the mule until the ensuing fall, subject to the contingency that the true owner

 McCartney, et al. v. Calhoun, et al.

should call for it. In violation of this contract, it was taken from him. It is not material to inquire whether the defendant is liable for the feed of the mule, or for the breach of the specific contract, as a suit for damages in the one or compensation for the other, might alike be in assumpsit.

In cases of this nature, we shall never feel disposed to reverse a judgment merely on account of the different estimate which might be made of the damage. Judgment affirmed.

McCARTNEY, ET AL. V. CALHOUN, ET AL.

1. The courts of ordinary of the State of Georgia, being courts of limited, and special jurisdiction, have no power to order the sale of the slaves of an intestate, unless the administrator make the representation, which the statute requires. This must appear from the record; and if it does not, the court was without jurisdiction and the sale void.
2. It is error in the chancellor to direct the master to take an account, and after ascertaining the amount due the complainant, to apportion it among the several defendants, and if they do not pay on request, to issue execution.
3. Where one is administrator of two estates, a claim may be asserted in the same bill, against both, if all the defendants are equally interested in the question. It is not necessary their interest should be joint. It is sufficient if it is common to, or concerns them all.

Error to the Chancery Court of Talladega.

THE bill was originally filed on behalf of the defendant in error, an infant. The case made by the original, amended and supplemental bills, may be thus briefly stated: David Calhoun, the father of complainant, died in Franklin county, Georgia, some time in 1826, leaving a widow, and two sons, the complainant and his brother John C., and a considerable property in land, slaves, and other property, and unembarras-

sed, or owing but little. Matilda, the widow, and one William King, administered on the estate, and possessed themselves of it. Afterwards, the widow intermarried with King. By the law of Georgia, an administrator cannot sell the slaves belonging to his intestate, unless the other personal property, together with the hire of the slaves for one year, is insufficient for the payment of the debts; and that by the law of that State, a purchase made by an administrator at his own sale is fraudulent and void. That without any necessity therefor, the administrator, King, fraudulently procured an order for the sale of the slaves from the court of ordinary, and fraudulently sold, a man, a woman, and her three male children, and also a fourth born after the order of sale was made, and purchased the slaves himself, at the inadequate price of \$1,020.

That complainants further left real estate worth \$4,000, which King, without any order of the court for that purpose, exchanged for other land and negroes, taking the titles in his own name, and appropriating them to his own use, and has never accounted with the orphans' court in Georgia, for the sale of either the land or slaves, which proceeding in regard to the land, as well as slaves, was wholly unauthorized by the law of Georgia. That King induced his wife to consent to this course, by representing to her that it would be more convenient to have the slaves under their own control, than to hire them out from year to year, but fraudulently represented to the court of ordinary, that their sale was necessary to pay the debts of the deceased.

That the surety of King in his official bond, was only bound in the penal sum of \$2,000, and has since become wholly insolvent.

That King subsequently removed from the State of Georgia, bringing with him the slaves and other personal property of complainant's father, and complainant, and his brother John C. That King afterwards died, leaving his wife and John C. Calhoun, his executrix and executor. That John C. Calhoun, although he well knew that King had never paid for the slaves in his possession, and that they were not the property of King's estate, sold them as such, as the executor of King, purchased them himself, but never paid any thing

for them. That John C. Calhoun has also departed this life intestate, and unmarried, and that Solomon Spence, in virtue of his office of sheriff of Talladega, and as successor of David A. Griffin, sheriff, became his administrator, and claims the slaves' as his property. That they are now twelve in number, and are all in possession of said Spence, who is treating them as the property of said King, and John C. Calhoun. That both King, and John C. Calhoun, were much indebted, and that Spence is permitting the estate of David Calhoun, to be applied to the payment of the debts of King, and in particular has permitted three of the slaves to be levied on as the property of King, by Baker, Sprouls & Co.

That the twelve slaves, are all the property now remaining of his father's estate, of which estate he is entitled to two-thirds, as the heir of his father, and brother, and that the whole is insufficient to meet his just demands.

The prayer of the bill is for an injunction for general relief, &c.

The chancellor dismissed this bill for want of equity, which decree on writ of error to this court was reversed, and the cause remanded. [5 Ala. 528.]

Upon the return of the cause to the chancery court, the complainant filed a supplemental bill, alledging that he was unable to give the security required as the condition upon which an appeal was granted when his bill was dismissed. That after the time for taking an appeal expired, one William McLane, coroner of Talladega county, who had previously levied on two of the slaves by virtue of a *fi. fa.* against King, proceeded to sell the slaves so levied on, to wit, Isaac and Green, and that one Baker Dulaney purchased Isaac, and not long after sold him to one David McCulloch; and that Green was purchased by one George Williamson, all of whom had actual notice of complainant's claim.

That McLane not long afterwards levied on the residue of said slaves, viz., Mike, Candice, and her child Harriet, Mike, Jr., Elize, Nathan, Bob, Leah, and Adeline, under or by virtue of one or more *fi. fas.* in favor of Council McCartney, and on the day of 1842, sold the same at public outcry, McCartney becoming the purchaser, with full notice of complainant's claim.

McCartney, et al. v. Calhoun, et al.

The bill also alledges that McLane had full notice of complainant's claim, and that the sale was forbidden by an agent of complainant. All these persons are made parties to the bill.

Spence answered, and denies all knowledge of the transactions in Georgia, and calls for proof, and relies upon the fact that King brought the property to this State, and retained it as his own for two years, contracting debts on the faith of it, and pleads the statute of limitations. Admits that he was appointed administrator *de bonis non* of the estate of William King, and also administrator of the estate of J. C. Calhoun. Admits the levy and sale of two of the slaves as the property of King, to pay the debt of Baker, Sprouls & Co., which execution issued against King's executors. Admits the purchase by J. C. Calhoun at his own sale as executor, of the slaves in controversy. He further states, that he forbade the sale under McCartney's execution, and gave notice that he should be compelled to sue for them as the administrator of J. C. Calhoun. Admits that J. C. Calhoun has not paid any thing for the slaves, but insists that the sale was fair and *bona fide*.

McLane denies all knowledge of the matters said to have taken place in Georgia. Admits that he sold the slaves as coroner, the sheriff being interested upon executions against King's estate, as stated in the bill, and that the slaves were purchased by the persons there stated. Calls for proof of the allegations of the bill, and demurs, &c.

McCartney, and others, the purchasers of the slaves, admit the facts relating to their purchase of the slaves as the property of King's estate under execution, and deny generally all knowledge of the other facts stated in the bill, and call for proof and demur to the bill.

Mrs. King also answered the bill, admitting many of the charges relating to the transactions in Georgia, but as her answer exerts no influence over the rights of others, it is unnecessary to state it further.

The evidence in the cause, will be seen in the opinion of the court, so far as it is necessary to the understanding of the cause.

The chancellor, after disposing of some preliminary objections, proceeded to consider the cause on its merits, and held that the court of ordinary in Georgia, had no jurisdiction to order a sale of the slaves of David Calhoun, deceased, under the statutory provisions of that State. That therefore the sale, and the pretended purchase by King, was a nullity, and that the slaves still continued subject to distribution. That the complainant was entitled to one-third part of the slaves and their increase, but could not claim as the heir of his brother, who by his own act had estopped himself from asserting such a claim; and the fact, that the slaves were now in the hands of purchasers for a valuable consideration, who had notice of the claim, both actual and constructive, could not impair his right to charge the property in their hands, with the payment of his portion.

He also directed the master to take an account of the number and value of the slaves, with their increase to the time of such account; and also the value of the hire of the slaves annually from the 5th March, 1827, up to the time of stating said account. That he also report what sum per annum the complainant should pay King for board, clothing and education, with interest as above. To inquire which of the slaves was purchased by each of the defendants, with the value of each slave, and the increase of the females, if any. That one-third part of the sum so ascertained, shall constitute the distributive share of complainant, subject to a deduction for board, clothing, &c., and that he pay the same to the guardian of complainant, if he be still in his non-age, or to the complainant, if he be of full age.

That when the sum shall be ascertained, he shall apportion the same to the different defendants who purchased the slaves, according to the value of the slaves so purchased. That he give each of them notice to pay the same in thirty days, and on their failing to do so, that execution issue. Costs were decreed against the defendants.

W. P. CHILTON and S. F. RICE, for plaintiff in error, made the following points:

1. The bill is multifarious, and joins Dulaney and Williamson purchasers of two negroes, with McCartney the pur-

chaser of others, each of whom purchased under distinct judgments, and who have not the slightest identity of interest. [Kennedy's heirs and ex'rs v. Kennedy, 2 Al. R. 609; Mecham v. Goodwin, McKee, et al. last Term.]

2. The decree is erroneous, as it directs execution to issue upon a finding of the master, which the court should supervise and decide upon. [Farmer v. Arnold, 4 Littel, 192, 193; Terrell v. Arnold, *ibid*, 302; Jarman v. Davis, 4 Mon. 118; Griffin v. Depew, 3 Mar. 180; 5 *ibid*, 249; Payne v. Wallace, 6 *ibid*, 383.]

3. The court, by decreeing the master's report final in advance, denies the defendants the right of exception.

4. King, the testator, bought the negroes in Georgia under an order of the court of ordinary of that State. He has the same right to buy there that he has here—the common law right.

5. The order of the orphans' court of Georgia for the sale of the slaves, however irregular, cannot be collaterally impeached, and is good until impeached upon a direct proceeding. [Doe ex dem. Duval's heirs v. McLosky, 1 Al. R. 731; Perkins' ex'rs &c. v. Withers, 7 Ala. R. 855; Eslava v. Elliott, adm'r, 5 *ibid*, 264.]

6. No fraud is alledged in the sale to King; he bids a reasonable price; charges himself with the amount bid, and proceeds to pay off debts due from the estate of David Calhoun. The court, before setting aside the contract, should place him in *statu quo*.

7. The estates of King and J. C. Calhoun both having been reported insolvent, the creditors of both estates should be made parties, having a direct interest in this fund.

8. The decree is erroneous as against the purchasers, charging them with the hire of the slaves for some eighteen years before they ever had any thing to do with them, and interest on the hire.

9. Besides, the purchasers should have had the privilege of surrendering the slaves and accounting for their hire for the time they had them.

A. WHITE and PARSONS, contra.

The proof in this case, together with the statute of Geor-

gia, shows that King had no right to sell the slaves the subject of controversy. [Prince's Dig. 233, 234, § 2.] The proof shows conclusively that there was no need of selling to pay the debts, and the appraisement bill shows that an equal division of the slaves could have been made, each of them being entitled to an equal share. [See Prince's Digest, 233, § 42.]

The court of ordinary had no jurisdiction. No notice was given to the distributees or their guardians, as required by law. [Prince's Digest, 233, 234.]

The records of a court of limited jurisdiction should show every necessary to the validity of its sentences. [Lester v. Vivian, and others, 8 Por. 375.]

Executors and administrators, in making sales of property, must strictly comply with all statutory provisions on the subject, and unless every essential direction is complied with, all whose interests are affected will not be precluded thereby. [Ventress v. Smith, 10 Porter, 175; Monroe v. James, 4 Munford, 200; Knox, et al. v. Jenks, 7 Mass. 492; Wiley and Gayle v. White and Lester, 3 S. & P. 3 58.] And although this rule may be somewhat relaxed, as in the cases of Wyman v. Campbell, 6 Por. 219; Couch and Robinson v. Campbell, and others, *ibid*, 262; Doe ex dem. Duval's heirs v. McLoskey, 1 Ala. Rep. N. S. 708, and in case of Jennings v. Jenkins' adm'rs, 9 Ala. Rep. 285, in favor of *bona fide* purchasers; yet it is conceded it will operate with full force against an administrator who is a purchaser at his own sale.

An administrator is held to the utmost fairness in purchases at his own sale, and as a sequence must sell with a view to the interests of his *cestui que trusts* and not his own. [McLane v. Spence, 6 Ala. Rep. 894.]

The common law is in force in Georgia, except when changed or abrogated by the Legislature. [Prince's Digest, 570, § 3.] § 1. And in the absence of proof to the contrary, will be presumed to be the rule of decision in a sister State. [Mims v. Bank of Geo. 2 Ala. Rep. 204; Shephard v. Nabors, 6 Ala. Rep. 631.] And by the common law an administrator or executor could not purchase at his own sale. [*Ex parte* James, 8 Vesey, 347; Lister v. Lister, 6 Vesey, 631;

ex parte Bennett, 10 Vesey, 393; Whale v. Booth, 7 Term Rep. note a; McLeod v. Drummond, 17 Vesey, 168; Campbell v. Walker, 5 Vesey, 680.]

The chancery court of this State has jurisdiction though administration was taken out in Georgia. [Calhoun, by his next friend, v. King, and others, 5 Ala. R. 523; Williamson v. Branch Bank at Mobile, 7 Ala. Rep. 906; Julian, and others, v. Reynolds, and others, 8 Ala. Rep. 680.]

Complainant is entitled to an equal share in the estate with his mother and brother. [Prince's Digest, 233, § 42, sec. 5.]

Complainant's demand by the laws of Georgia would be entitled to satisfaction before any other debt of King out of the proceeds of his estate. [Prince's Dig. 233, § 41, sec. 5.]

Distribution of an estate must be had according to the law of the place where the administration was granted, and the payment of debts made in the same manner as though the remedy was sought at the place of appointment. [McNamara v. Duzer, 7 Paige's Rep. 239.]

The objections to the depositions should have been brought up by a motion to suppress, and upon notice, [Barbour's Ch. Pr. vol. 1, 316,] and is not revisable. [Cullum v. Smith and Conklin, 6 Ala. Rep. 626.]

As to when and what interest an administrator or executor is chargeable with, see T. & J. Kirkman; and others, v. Vanleer, 7 Ala. Rep. 230, 231; Granberry v. Granberry, 1 Wash. 246; Cavendish v. Fleming, 3 Munford, 198; Beeson v. Bruce, 4 Dess. 463.]

ORMOND, J.—The principal question in the cause is, whether William King, the administrator of David Calhoun, in the State of Georgia, acquired a title to the slaves, Mike, Candice and their children, by his purchase at his own sale, made in that State in the year 1828. If the sale was wholly unauthorized, the purchase by him was a nullity; but if the court of ordinary, in Georgia, had jurisdiction of the subject, and could therefore have directed the sale of the slaves, no matter how irregular its action may have been, the proceeding is not void, but voidable merely, and the title acquired by a purchaser at such an irregular sale, will be good

until the order is reversed by a direct proceeding, having that for its object. The law was so held by this court, on great consideration, in the case of *Campbell v. Wyman*, 6 Porter, 219, and *Couch v. Robinson and Campbell*, ib. 262. The principles there determined, have been repeatedly recognized since, and must now be considered the settled law of this court.

To ascertain whether the court of ordinary in Georgia, acquired jurisdiction, we must look to the statute conferring the power, which is as follows: "No administrator shall be allowed to sell any slave or slaves, belonging to the estate of his intestate, but where the other personal estate, together with the hire of each slave, or slaves for twelve months, shall be insufficient to discharge the debts due by the estate; or where one or more slaves shall be subject to distribution, and an equal division thereof cannot be made in kind, it shall be lawful for the court of ordinary, by which administration was granted, to direct the sale of such slave or slaves. Provided always, that such distributee, or his, her, or their guardian, shall receive twenty days notice in writing, previous to the granting of such order, to show cause if any he or they can, against such sale." [Prince's Dig. 234, § 45.]

We are not advised of any authoritative exposition by the courts of Georgia upon this statute, but it is obvious that these courts, as the orphans' court in this State, are courts of special, and limited jurisdiction. The source of their power is found in the acts of the legislature creating them. From the authority there conferred, they derive their jurisdiction, and if no warrant can there be found for their acts, they are *coram non judice*.

It is evident the statute just cited, did not confer on the court of ordinary the right to direct the sale of slaves, as in its discretion it might think proper; nor did it have such power as an incident of granting letters of administration, but only in two contingencies—where the other personal property, together with the hire of the slaves for a year, was insufficient for the payment of the debts of the deceased, or when an equal division could not be made in kind among the distributees. As these are facts which the court could not judicially know, it necessarily follows, that it must act

upon the representation of the administrator, or of the distributees, or some of them, and this representation is its authority for entering upon an investigation of the facts, which may result in its judgment, that a sale is necessary, evidenced by its order, or decree directing a sale to be made. Unless the record discloses that a representation of the facts was made, by some one authorized to make it, the court was without jurisdiction, and could not enter upon the inquiry, whether a sale was necessary; for no principle is better settled, than that the jurisdiction of every court of special, and limited jurisdiction, must appear on the face of the proceedings. [Talliaferro v. Basset, 3 Ala. R. 670, and cases there cited.] The argument urged, that we must presume those things to have been done, without which the court of ordinary could not have directed the sale of the slaves, is at war with the entire current of authority, and would confound all the distinctions, between courts of general and those of limited jurisdiction.

If it appeared from the record, that a petition had been filed, either by one being found in the record, or the recital of the record, that the necessary representation had been made, every presumption in favor of the correct action of the court would be proper, when its judgment came collaterally in question; but we cannot presume the power of the court to act; that must appear from the record itself.

From the record it appears, that Martha M. Calhoun, and William King, were appointed administrators of the estate of David Calhoun, at the March term, 1827, of the court of ordinary for Franklin county, Georgia, and executed their bond as such, and at the same term of the court, the following order was made: "It is ordered by the court, that the administrator of David Calhoun proceed to sell, after advertising the same according to law, the following negroes belonging to said estate, to wit: Mike, Candice, and her three children, Mike, Green, and Isaac." There is then nothing shown upon this record, that the court had power to make this order, but it appears to have been considered by the court as an ordinary act of power, flowing from the grant of letters of administration. There is no citation to the heirs, or any evidence furnished by the record, that the court entered up-

on the inquiry, if we could presume the proper representation to have been made, whether a sale was necessary and proper.

This statute of the State of Georgia, appears to be entirely analagous to the statutes of this State, authorizing the orphans' court to order a sale of land, for the purpose of paying debts, or for more equal distribution among the heirs. Our statutes provide that this may be done, on the petition of the administrator, and citation to the heirs; or when commissioners appointed to make division, return that such division cannot be fairly and equitably made. In expounding these statutes, it has been held, that the jurisdiction of the court attached, when it acts upon the petition of the administrator and directs citation to the heirs—or when the court assumes to act upon such petition, reciting it, or upon the report of commissioners, that an equitable division cannot be made. [Campbell v. Wyman, and Couch & Robinson v. Campbell *supra*, and Duval's Heirs v. McLoskey, 1 Ala. R. 730; see also, Thompson v. Tolmie, 2 Peters, 157, and McPherson v. Cunliffe, 11 S. & R. 429.]

Our conclusion is, that as it does not appear, that the court of ordinary had jurisdiction to order a sale of these slaves, the administrator acquired no title by his purchase, but that they still remain the property of his intestate. This renders it unnecessary to inquire, what would be the effect under the law of Georgia, of an administrator purchasing at his own sale.

This was also the conclusion of the chancellor, and he correctly considered that these slaves and their increase were still liable to the distributive share of the complainant in his father's estate. To ascertain which, an account was necessary, and must be taken, of the administration of King, upon Calhoun's estate; one third part of the sum remaining in his hands for distribution being the distributive share of the complainant, subject to a deduction for all proper expenses incurred by King, in boarding, clothing, and educating him.

The defendants, purchasers from King pending this litigation, and having also express notice of the complainant's demand, are in no better condition than King; but, in our opinion, the chancellor erred in referring it to the master, to

ascertain after the account was taken, what sum each of these defendants should pay, and after making demand of them, to issue execution for the amount if not paid. This was erroneous, because it deprived the defendants of the right of excepting to the account stated by the master, and to the apportionment made by him, among the several defendants, of the gross amount found due from King to the complainant. These acts were not ministerial merely, they involved the exercise of judicial power, and therefore the defendants could not be deprived of their right of exception, and appeal to the chancellor.

The bill is not multifarious. As to the claim set up in the bill to the distributive share of J. C. Calhoun, it is sufficient to say, that Spence was the administrator both of the estates of King and J. C. Calhoun, and that these estates were so blended together, that they could not well have been separately considered, and all the defendants, as purchasers of the slaves as the property of King, were equally interested in both estates, as it respects the complainant's demand. The defendants having purchased the slaves as the property of King, have a common interest in resisting the complainant's equity. It is no objection that they purchased under different judgments, as it is not necessary that their interest should be joint. It is sufficient that they have an interest which is common to, or concerns them all. [P. & M. Bank v. Walker, 7 Ala. R. 950.] Besides it was proper to unite them all, that the loss might be properly apportioned among them.

It is proper to remark, to prevent misapprehension, that all questions relating to the account, and the principles upon which it should be stated, are designedly left open. Let the decree be reversed, and the cause remanded for further proceedings.

WESTMORELAND, BY HIS GUARDIAN, &c. v. HALE.

1. The act of 1819, which gives a summary remedy against a sheriff and his sureties, for the failure to return an execution, does not extend to an execution issued on a decree of the orphans' court, and made returnable to one of the *return days* which the judge of the county court is required, by the act of 1821 to appoint. *Quere?* If such execution was returnable to a *stated term* of the county court, could the sheriff and his sureties be proceeded against summarily for a failure to return it?
2. The act of 1807, which declares that the unsuccessful party shall be liable for the costs, applies to all cases at law in which the plaintiff fails, whether the suit is instituted in the ordinary form, or whether the court in which redress is sought has jurisdiction or not.

Writ of Error to the Orphans' Court of Macon.

THIS was a proceeding by notice and motion against the defendant in error for failing to return a writ of *fieri facias* placed in his hands, as the sheriff of Montgomery. The notice describes the execution with particularity, as to the date, amount, parties, &c.; states that on the 21st December, 1845, it was delivered to the defendant, and returnable on the second Monday in January; and indicates that the motion will be made under the act of 1819. Upon the case coming before the court pursuant to the notice, the defendant moved to dismiss the proceeding for want of jurisdiction; the motion was accordingly granted, and judgment rendered against the plaintiff for costs.

J. W. PRYOR, for the plaintiff in error, insisted that the jurisdiction of the orphans' court was maintainable from the different statutes regulating the duties of sheriffs. All persons who recover any debt, damages, or costs, by judgment of any court, may enforce the collection by *fieri facias*. [Cl. Dig. 199, § 1.] Orphans' courts are courts of record, and their decrees have the force and effect of judgments, on which

execution may issue. [Clay's Dig. 300, § 21.] Such executions, like all others must go into the sheriff's hands, who must obey their mandate. [Clay's Dig. 305, § 43; 336, § 131.] And for his neglect to do so, may be ruled as in other cases. [Clay's Dig. 206, § 22.] Constables are subject to the proceeding by notice for official neglect. [Clay's Dig. 219, § 87.] So are sheriffs who fail to return executions for costs from the supreme court. The entire scope of legislation upon this subject shows, that the present case comes within the act of 1819. [15 Mass. Rep. 206; Minor's Rep. 48; 1 Stew. Rep. 63; Ld. Raym. Rep. 1028; 1 Pet. Rep. 46; 1 Dall. Rep. 136; 5 Humph. Rep. 379; 8 Ala. R. 179; Clay's Dig. 296, § 1; 297, § 4.]

J. E. BELSER and J. A. ELMORE, for the defendants in error contended, that a rule against a sheriff for failing to return an execution to the orphans' court cannot be supported, under the act of 1819. [Clay's Dig. 206, § 22.] That is a court of special and limited jurisdiction, and can only exercise such power as is conferred by statute. [2 Har. & G. R. 120; 3 Ala. Rep. 674; 1 Saund. Rep. 97; 1 Johns. R. 20, 228; 4 Cranch's Rep. 75; Minor's Rep. 143; 2 Ala. Rep. 646; 4 Id. 755.] Neither the letter or spirit of a statute considered singly, can confer jurisdiction, or impose a penalty or forfeiture—both must concur, and express words are necessary. [6 Bac. Ab. 384, 388, 392; 19 Vin. Ab. 514, § 33, 516, § 52; Strange's Rep. 260; 11 Coke Rep. 65; Dwarris on Sta. 69; 2 Johns. Rep. 379; 1 Mass. Rep. 167; 3 Caine's Rep. 259; 8 Porter's Rep. 564; 4 Ala. Rep. 344; 6 Id. 625; 8 Id. 517, 655.] The remedy against sheriffs, by the act of 1819, is cumulative, and will lie only where it is expressly given. [6 Bac. Ab. 393; 4 T. Rep. 116; 5 Stew. & P. R. 446; 1 Ala. Rep. 227; 3 Id. 361, 239, 421, 465; 8 Id. 177, 508; 19 Vin. Ab. 503, § 4; 512, § 12, 13, and notes.]

In construing a statute prescribing new remedies, reference must be had to the courts, and their jurisdiction as exercised at the time of its enactment; and only those expressly named, or exercising their powers according to the course of the common law, can give effect to such remedy. [6 Coke's R.

20.] Statutes conferring general powers, or expressed in general terms, must be construed in reference to the subject matter, and may be restricted accordingly. [Clay's Dig. 63, § 39, 40; 217, § 80; 218, § 86; 6 Ala. Rep. 625; 8 Id. 121.]

The orphans' court was created previous to 1819, but its power to issue executions was afterwards conferred: *besides*, the mode of its organization, procedure, &c. are so peculiar and restricted, as to forbid the conclusion that it can entertain the present case. [Clay's Dig. 300, § 21; 303, § 31; 304, § 37, 42; 204, § 14; 343, § 166, 170; Minor's Rep. 425; 1 Stew. Rep. 63, 375; 8 Ala. R. 121.] It results from what has been said, that the case was properly dismissed at the plaintiff's cost. [1 Pet. Rep. 340; 2 Tyler's Rep. 218; 4 Johns. Rep. 291; 19 Id. 39; Minor's Rep. 64; Clay's D. 316, § 20; 1 Root Rep. 409; 2 Bailey Rep. 409; 4 Blackf. Rep. 356.]

COLLIER, C. J.—The act of 1807 declares, that "all persons who shall recover any debt," &c. "by the judgment of any court of record within this State, may at their election, prosecute writs of *fieri facias*," &c. [Clay's Dig. 199, § 1.] This enactment, though applying professedly to all courts of record, was limited in its operation to those which were permitted to render judgments on which executions could issue, and did not necessarily confer the power to render such judgments, or in any manner interfere with the previous proceedings in a cause. The authority of a court to issue execution, depends upon the manner of its organization, and the extent of its powers, and is not a necessary sequence from the adjudication of the rights of parties before it. This is a conclusion well supported, not only by adjudged cases, but by the legislation of this State in respect to the orphans' court. By the act of 1821, it is enacted, that "the documents and evidence of all settlements made with executors, administrators, and guardians, shall be carefully preserved by the clerk of the county court, and the settlement entered of record; which evidence, vouchers, documents and settlements shall be good evidence in any suit for

or against such executor, administrator or guardian, and shall not be impeached except for fraud in obtaining the same." [Clay's Dig. 304, § 37.] Here is a clear indication that the legislature never intended that an execution should issue upon a settlement made by the orphans' court of the accounts of an executor, &c., although it is declared to be conclusive upon the rights of all parties, unless fraud is shown. And such was not only the construction in practice, but it has been repeatedly so ruled by this court. Money adjudged in such cases to be paid to legatees, distributees, &c. was not collected under an execution issued upon an order or decree in their favor, until 1830, when it was enacted that "all decrees made by the 'orphans' court on final settlement on the accounts of executors, administrators, and guardians, shall have the force and effect of judgments at law, and executions may issue thereon, for the collection of the several distributive amounts against such executor, administrator, or guardian." It is further provided, that when such distribution is decreed, each distributee, &c. shall, in case of personal estate, have a writ of execution or attachment, or both; and in case of real estate, a writ of *habere facias possessionem* against the distributee, &c.; "and the sheriff to whom the writ shall be directed shall execute the same according to the command thereof." [Clay's Dig. 304, § 42; 305, § 43.]

The act of 1821, remodeled the county court, and to a great extent prescribed the duties of the judge thereof, in the exercise of jurisdiction over the estates of deceased persons, and kindred cases. Among other things, it provided, that he shall have power within the county, to take the probate of wills, &c., and to make all necessary orders for the issuing process, and other purposes, within his jurisdiction, according to such regulations as are, or may be, established by law in such cases. Each judge is required, by order in open court, to appoint certain days, *not less than one day in every period of each month*, for the return of process in such cases as he is competent to hear and determine in vacation, and on each return day shall attend at the court house, or place appointed for holding the county court, to determine such cases. All process issued in such cases shall be returnable to

the next return day, or if the party applying therefor shall so require, to some other return day, or stated session, &c. "The clerk of the court and sheriff shall attend the sittings of the judge on return days, as well as at the stated sessions." [Clay's Dig. 303, § 31.] This statute does not confer upon the judge of the county court authority to dispose of all cases pertaining to the orphans' court, at a return day to be appointed by him; but he is then only to act upon such matters as he is competent to hear and determine in vacation, and only process in such cases shall be then returnable.

In the case at bar, the execution was made returnable to the orphans' court on a day appointed by the judge for the return of process; and the notice of the motion for failing to return it, was also returnable on one of these days. The questions now raised upon the execution and motion, are, whether the former is not a nullity, or if not, whether the latter can be supported. It is indicated by the notice that the proceeding was instituted under the act of 1819, for the failure to return the execution. That enactment, as subsequently amended, provides, that if a sheriff shall fail to return an execution to the clerk's office from which it shall issue, at least three days previous to the term of the court to which it shall be returnable, the person aggrieved shall move against such delinquent sheriff, and have judgment against him and his sureties, &c. [Clay's Dig. 205, § 21; 206, § 22; 336, § 131.]

From this notice of the legislation upon the subject, it is sufficiently apparent that the orphans' court was not authorized to issue an execution upon its decrees, until the act of 1830 was passed, and it is therefore argued, that as it is a court of special and limited jurisdiction, the act of 1819 cannot, by construction, apply to such executions. Waiving the consideration of this argument in the form in which it is presented, we may concede that it is not perfectly clear that an execution issued from the orphans' court, should be returned to one of the return days appointed by the judge thereof. These return days, as we have seen, are directed by the act of 1821, to be appointed for the return of process in such cases as he is competent to hear and determine in vacation. Can these return days be regarded as so many terms of the

orphans' court, or is not the "stated session" to which such process *may be returnable*, the time of holding the county court which the legislature has prescribed? *Again*: The act of 1819 contemplates an execution returnable to a term of the court from which it issued, and as it is highly penal, can the extraordinary remedy which it gives be applied to one which is directed to be returned in vacation? We make these inquiries, as they have been suggested by the argument of another case at this term, and leave them for future consideration.

Conceding that the execution in the case before us was regular, and that it was the duty of the sheriff to obey its mandates, and we think the orphans' court rightly repudiated the motion. There is certainly no statute which authorizes that court to entertain an action prosecuted in the ordinary form against an officer for disobedience to its order, or any other cause; and its jurisdiction of the proceeding in question can only be supported by an unwarrantable construction of the statutes we have noticed. Such an exercise of power does not come within the appropriate jurisdiction of an orphans' court. The trial of an issue in such a proceeding does not involve a question affecting the duties and liabilities of executors, administrators or guardians, but is independent of and disconnected with them. The form of the judgment assumes as its basis a neglect of official duty, and is not only for the amount of the execution, but for damages in addition; and this without reference to the solvency of the defendant in execution. If the party in whose favor a decree of the orphans' court is rendered, would avail himself of the summary remedy against sheriffs, &c., he should cause his execution to be returned to a *stated term* of the county court. We will not say that the sheriff would even then be chargeable for a neglect to return it—that question is not necessarily presented; but we are satisfied that an execution returnable to a return day appointed by the act of 1821, is not embraced by the statute of 1819. This latter enactment, as we have said, is highly penal, and cannot be extended by construction—the orphans' court is one of special and limited powers, which are defined by the legislature—none of which,

expressly or by necessary implication, confer the jurisdiction which that court is called on to exercise in this case.

Whether, if the execution is regular, the orphans' court could not coerce its return by attachment, or whether an action would not lie in the proper tribunal for the sheriff's neglect, are questions not now presented.

We need not inquire whether this case comes within the letter of the act of 1807, which makes the unsuccessful party liable for costs. [Clay's Dig. 316, § 20.] That statute has been practically and judicially applied to all cases at law in which the actor is unsuccessful, whether the suit be instituted by writ in the ordinary form, or whether the court has jurisdiction to give the redress sought, if the case be supported by proof. It therefore results from what has been said, that the judgment of the orphans' court must be affirmed.

WILKINSON v. ALLEN, ET AL.

1. To a *sci. fa.* against an heir and devisee seeking to subject descended or devised lands to the payment of a judgment against the ancestor, it is a good plea that no lands have descended, &c.
2. In a *sci. fa.* against an executrix and heir or devisee, the former cannot be made responsible to a judgment to be levied of the goods and chattels in her hands to be administered; and a replication by way of new assignment charging her in that character, is a departure from the *sci. fa.* and may properly be stricken out.
3. Under an issue formed on the plea of the heir, &c. that no lands descended, &c. the *onus* rests with the plaintiff to show the particular lands sought to be charged; and a devise of all lands in a will is no proof that any descended or were devised.

Writ of Error to the Circuit Court of Tuskaloosa.

THIS is a proceeding by *sci. fa.* at the suit of Wilkinson against Mary L. Allen as executrix, and J. N. Allen as devi-

see, of W. B. Allen, to have execution against the lands devised in satisfaction of a judgment recovered against Allen in his lifetime.

The plaintiff filed a suggestion in the clerk's office, setting out the judgment obtained in the lifetime of Allen, and asserting that since its recovery Allen had died, leaving all his real and personal estate (except certain bequests) to his wife, Mary L. Allen, and his son, J. N. Allen, appointing the said Mary L. and one Henry his executors. That said Mary having proved the will and taken on herself the administration of said estate, she failed to make application to the proper court for the sale of the real estate descended as aforesaid; and sale of the same or of some part thereof being necessary to satisfy the plaintiff's judgment, he therefore prayed a *sci. fa.* against the said Mary and J. N. Allen, returnable, &c., for them then and there to show cause why he should not have execution of the said real estate.

A *sci. fa.* was thereupon issued conforming substantially to the suggestion, and this was returned executed on both defendants.

The plaintiff obtained leave to amend his *sci. fa.* by inserting therein a description of the lands descended, but no amendment seems to have been made.

The defendants then pleaded as follows:

By way of protestation, say that the said W. B. Allen was not at the time of his death seized and possessed of any lands whatsoever, or of any real estate whatever which was devised by him or which descended to his heirs at law, and of this they put themselves on the country.

This plea was verified by the oath of one of the defendants. The plaintiff demurred, but his demurrer was overruled.

He then replied by asserting that the lands which belonged to the estate of said W. B. Allen have descended to the said J. N. Allen, and of this he put himself on the country. He also as to the plea of the said Mary said *precludi non*, because he commenced his action by *sci. fa.* against her as executrix of the last will and testament of W. B. Allen and said J. N., the heir of said W. B. A., not against the real es-

tate alone of the said deceased mentioned in the plea of the defendants, but also to recover the amount of his said judgment, with costs and interest, which the said Mary, as executrix, was and is bound to pay out of the moneys and assets belonging to the estate of the said W. B. A., and this the said plaintiff is ready to verify; wherefore, inasmuch as the said Mary has not answered the said complaint of the plaintiff as to the moneys and assets which have come to her hands to be administered, and as newly assigned as aforesaid, he prays judgment, &c.

This latter plea or new assignment was stricken out by the court on the defendants' motion.

At the trial of the issue the plaintiff insisted it rested with the defendant to prove that no lands had descended, but the court ruled the *onus* was with the plaintiff.

The plaintiff then read in evidence the will of Allen, which contains this clause: "I devise and bequeath all my estate, both real and personal, to my wife, Mary L, and my son, Joseph N, share and share alike, to be equally divided between them." There being no other proof on either side, the court charged the jury, the defendant, J. N. Allen, was not bound to prove the averment in his plea, that no lands had descended to him, and that if there was no proof before them other than the will of Allen, they must find for the defendants.

The plaintiff excepted to this charge, and here assigns that the circuit court erred—

1. In overruling the plaintiff's demurrer to the defendants' plea.
2. In striking out the new assignment as to the executrix.
3. In the rulings and charge at the trial.

CLYDE, for the plaintiff in error, insisted—

1. The defendants' plea is bad. It should state that no lands have come to the possession of the heirs, belonging to the estate, since the date of the judgment. It is vague and uncertain in terms, and is not an answer to the suggestion.

2. The new assignment was well pleaded. It usually occurs in actions of trespass or replevin; but it may be used in any form of action, whether *ex delictu* or *ex contractu*. [2

Saund. Pl. and Ev. 683; Steph. Pl. 244; 1 Chit. Pl. 659; ib. 127, 521; 1 Price, 23.]

The administrator is made a party, "obviously for the purpose of enabling him to show whether the estate is insolvent." [5 A. R. 504; Clay's Dig. 197, § 27.]

3. In general, it is necessary for a party who brings an action, to prove all the material facts which he alledges in support of his claim; yet, where the defendant pleads a fact within his own knowledge, in discharge of himself, and the plaintiff still insists on the defendant's liability, alledging the same fact in his replication; there the burthen of the proof lies on the defendant, not upon the plaintiff. [1 Phil. Ev. 199.]

If a particular fact, lie more particularly within the cognizance of one party, that party must prove it though a negative. [1 Saund. Pl. & Ev. 491; 1 Phil. Ev. 198, and note 2, and authorities there cited. [1 Stark. E. 363.]

It is sufficient to prove a fact from which the rest of the affirmative allegation, in the absence of any other evidence, is a presumable consequence. [1 Stark. Ev. 363.]

COCHRAN, contra.

GOLDTHWAITE, J.—1. We shall waive any consideration here whether the statute on which this proceeding seems to be founded extends to devisees as well as heirs, and confine our examination to the precise questions presented on the record. It is insisted the plea of the defendants is bad, for the reason that it omits to assert that no lands have come to the possession of the heir—assuming that J. N. Allen is attempted to be charged in that character. We understand the plea as directly asserting this fact, and something more, where it is said that no lands descended to the party or were devised to him. These assertions would not accord with truth, if the party was possessed of lands in his character of heir or devisee. We think there was no error in overruling the demurrer.

2. The next question is that which arises out of the disposition made of what is called the new assignment as to the executrix. A new assignment sometimes becomes necessary

when the allegations of the declaration are so general that two or more causes of action can be given in evidence under it; when the defendant has a sufficient defence as to one of such causes and pleads it, the necessity is imposed on the plaintiff to new assign, as otherwise the plea would be applied to any cause of action covered by the declaration. [Chit. Plead. 659.] But there is no cause whatever to apply the doctrine of new assignments to this cause, for the *sci. fa.* asserts nothing which authorizes the court, if the defendants said nothing in bar, to have the executrix made a party to the old judgment. The plaintiff, if he wished to have execution against the goods, &c. in her hands to be administered, was authorized to sue out a *sci. fa.* against her for this purpose; but to such a proceeding the heir or devisee would certainly be no party. In proceeding under the statute to have execution against the lands devised to the heir, the administrator is required to be made a party, and the reason is said, in *Fitzpatrick v. Edgar*, 5 Ala. Rep. 499, to be, to give him the opportunity to show the estate is insolvent, in which event, as there shown, the lien of the creditor is lost.

The attempt to new assign, in our judgment was an obvious departure from the previous pleading, and was properly rejected.

3. The bill of exceptions presents a question quite novel and of some intrinsic difficulty. It will be remembered the effort here is not to charge the heir on account of assets descended, but to have execution of lands supposed to be bound by the judgment against the ancestor. The question is, whether in such a case the creditor is entitled to a general judgment, without showing particular lands of which it is to be levied. The case of *Jefferson v. Martin*, 2 Saund. 6, embodies in its pleadings and notes all the learning on the subject of the statute of Westminster, which is believed to be the parent of our own in relation to the present matter. The *sci. fa.* in that case was in general terms, commanding the sheriff to summons the heir of the *connusor* as well as the *terre tenants* of his lands at the time of the recognizance.

The return of the sheriff describes the particular lands in the possession of each *terre tenant*, and asserts there is no heir. It is on this return that the pleadings are formed, and

each tenant disputes with the plaintiff his right to have execution as against the lands of which he claims to be tenant. It is said in the notes, the heir is chargeable as a tenant, and not as heir, under this statute, (Notes, 4, 8;) and the tenant whom it is necessary to summon, as the tenant of the freehold, is not the mere occupant of the premises. It is, we think, quite evident that the sheriff returns the *sci. fa.* both as to heirs and *terre tenants*, at the nomination of the plaintiff, and therefore the return must be considered as the plaintiff's suggestion, that certain persons held the possession of the particular lands which he insists are bound by the lien of his judgment or recognizance. The effect given to the return of the sheriff was such, that the courts would not allow it to be contradicted by a general plea of *non tenure*, though the tenant was allowed to get rid of this effect by alledging a fictitious demise, anterior to the judgment, &c. (Note 19.)

When we apply this apparently antiquated learning to our particular statute, there is no great difficulty in its construction. That provides, that whenever the executor or administrator of any decedent, shall fail to apply to the orphans' court for the sale of real estate, for the purpose of paying the debts due thereby, the judgment creditor may file a suggestion in the clerk's office, in which the judgment is rendered, that real estate has descended to the heirs, and that sale of the same, or of some part thereof, is necessary for the satisfaction of the judgment; and that said executor, &c. has failed, or refused to make application for the sale thereof, and shall set out the names of the personal representative and heirs, and thereupon may sue out a *sci. fa.*, &c. [Dig. 197, § 27.] Now, although the suggestion and *sci. fa.* is not required to be specific in the description of the lands against which the execution is sought, we should be inclined to doubt whether a judgment would be regular without some description of the lands; but however this may be, we are satisfied the plaintiff may be put to a specific description of the lands sought to be charged, by a general plea, denying that any lands passed to the heir by descent; the replication to such a plea would, instead of being general, specify the particular lands.

In the present case, the issue seems to be formed without reference to any description whatever, but we do not think the onus of proof is thereby changed. If lands have descended to the heir, this is an affirmative fact which the plaintiff was required to show. In the nature of things, it was impossible for the other party to show that no lands passed to him by operation of law.

In this view there is no error in the record. Judgment affirmed.

DRINKWATER v. HOLLIDAY.

1. An admission of indebtedness, in a precise, ascertained sum, is not an open account, or barred by the statute of limitations of three years.
2. When there is an unsettled account between two persons, and one receives from the other a sum of money, which he agrees to secure by a deed of trust; he may, when sued for this money, reduce the amount, or defeat the action, by showing that the other party was indebted to him at the time upon the unsettled account; but he cannot cast upon the other party the burthen of unravelling the account.
3. A surety to an attachment bond, who is a necessary witness for the party, may be made competent, by the execution of a new bond with other sufficient surety, and it is the duty of the court to permit such substitution to be made.

Error to the Circuit Court of Marion.

DEBT by the plaintiff in error, commenced by process of attachment.

Pleas, *nil debit*, and the statutes of limitation of three and six years.

Upon the trial, as appears from a bill of exceptions, the plaintiff made affidavit, that Brunson Hollis, his agent, in taking out the attachment, and executing the attachment bond was a material witness for him, and he knew of no other per-

son by whom he could prove the same facts, and moved for leave to execute a new bond, which being refused, he then moved the court for permission to execute a bond of indemnity to the defendant against all damages he might sustain, by the wrongful or vexatious suing out the attachment, so as to enable the witness to testify, which the court also refused, and he excepted.

The plaintiff then proved by one John Hollis, that some time in 1837, he paid over to defendant \$30, money coming from plaintiff, from the estate of Daniel Holliday, of which witness was administrator. The same witness proved, that on the 20th January, 1840, he paid the witness \$314, in pursuance of an order from the plaintiff, as follows:

“ Tallahatchee Co., Miss., January 13, 1840.

Col. John Hollis. Dear Sir—Please pay over to Mr. Joseph Holliday, whatever money you have in your hands coming to me, from the estate of D. Holliday, and take his receipt for the same, and oblige yours, &c.

W. W. DRINKWATER.

P. S.—When I see you we can come to a final settlement.”

Witness took defendant's receipt, and remarked to defendant, I suppose, Mr. Holliday, this is in payment of what Mr. Drinkwater owes you; if I was you I would not pay it back. To which defendant replied, he did not intend to do so.

Plaintiff also proved, by one William Hollis, that some five or six years ago, in company with one Brunson Hollis, he accompanied the defendant to Mississippi, who informed him that he was going to plaintiff to get some money, and on his return, said he had got what was equal to money, an order on Col. J. Hollis; and further said, he had promised plaintiff to execute a deed of trust to Brunson Hollis, as agent of plaintiff, upon a negro boy, to secure the payment of the money to be obtained from Col. Hollis.

Another witness testified, that some five or six years ago, he heard defendant converse with Brunson Hollis, the agent of plaintiff, about a deed of trust he had promised to make to plaintiff. He said he owed him some money, and had promised to make him a deed of trust to secure it, but that the negro was then sick, and it was not worth while to make

it. He said he could pay plaintiff, and if he should not be able, and the negro recovered, he could take him. There was no proof of any promise to pay within three years.

The plaintiff's counsel requested the court to charge the jury, that if from the testimony, they believed that defendant, when he obtained the order from plaintiff to Hollis, promised to make a deed of trust to secure the payment of the money, that this was such a contract, and closing of the account, as would take the case out of the statute of limitations of three years. The court refused so to charge, but informed the jury, that this would not close the account.

The court charged further, that if the parties came to a settlement, and closed their accounts, the statute of three years would not bar the claim; but if one asserted a claim, and the other denied it, and there was no written evidence, and no settlement, then the statute of three years would bar the claim.

To all which the plaintiff excepted, and which he now assigns as error.

W. R. SMITH, for plaintiff in error.

COGGIN & NOOE, contra.

ORMOND, J.—It is inferrible from the proof in the cause, that there was an old account, of long standing between these parties unsettled. It appears also, that in the year 1840, the defendant went to Mississippi, where the plaintiff resided, to get money, but whether as a loan, or in payment of a balance due him, does not appear. It is certain, however, that no settlement took place, but the plaintiff gave him an order on his agent in this State, for the money he then had on hand belonging to him, the repayment of which to the plaintiff, was to be secured by a deed of trust on a slave. He obtained the money, but afterwards excused himself from making the deed, because the negro was sick, and that he was able to pay the debt, if not, and the negro recovered, plaintiff could take him.

It is perfectly clear from this statement, we think, that this advance of the money in Col. Hollis' hands, is a separate and

distinct transaction, from the general account between these parties. This is conclusively shown by the promise of the defendant to secure the payment of the sum he was to obtain, and his admission subsequently of his liability to pay it, and of the plaintiff's right to the slave. This is a direct admission of indebtedness to that amount, and being a precise, ascertained sum, is not an open account, or barred by the statute of limitations of three years, although not reduced to writing. [Caruthers & Kinkle v. Mardis, 3 Ala. R. 600, and the previous cases in this court there cited.]

There can be no doubt, that the defendant could reduce this amount by showing, that the plaintiff was then indebted to him, upon a subsisting account, which though due was not liquidated at the time the advance was made to him by the plaintiff; but he cannot, after receiving this money upon an agreement to acknowledge himself the debtor of the plaintiff for the sum to be received, cast upon the plaintiff the burthen of unravelling his account, and showing what is the true state of the accounts between the parties.

The practice of courts in modern times, is to prevent the exclusion of interested witnesses, if by any means in the power of the party, their competency can be restored, and no prejudice result to the other party. Thus, a surety to an appeal from an inferior court, may become a witness for the appellant, upon another surety being substituted in his place. [Tompkins v. Curtis, 3 Cowen, 251.] *So also bail may be substituted, and an *exoneretur* entered as to the former bail, to enable him to testify. [Leggett v. Boyd, 3 Wend. 376.] And this it is said is a matter of right. See also, Irwin v. Cargill, 8 Johns. R. 407, and Stimmel v. Underwood, 3 Gill. & J. 282.] We entertain no doubt whatever of the power of the court in such a case as this, to cause a new bond to be substituted with sufficient surety, and to cancel the bond first executed; and as little about its being the duty of the court in such a case, when no possible injury could accrue, to direct it to be done. The only doubt we have felt, is, whether it is not one of the discretionary powers of the court trying the cause. But as this judgment must be reversed on the

other point considered, it is not necessary to determine this at this time.

Let the judgment be reversed and the cause remanded.

WILLIAMS v. SPEARS.

1. Where the replication to a plea of the pendency of another action denies the existence of the record, it should conclude with a verification by the record; but if it goes farther and affirms, that if there was another suit, the record of which would show it to be identical with that to which the pleading applies, yet in fact the causes are different; or in other words, if it be so framed as to allow the plaintiff upon the production of a record by the defendant which would support his plea, to show that the matter in controversy in the suit first instituted was not identical, then it should conclude to the country.
2. Where the defendant pleads the existence of a record, it is not necessary for the plaintiff to new assign in order to let in proof of an extrinsic fact, which does not contradict, but merely limits the operation of the record.
3. If the defendant interposes a demurrer to an entire declaration containing several counts, if either count is good, the demurrer should be overruled.
4. Where the words charged in the declaration in an action of slander, indicate, that if the plaintiff did testify falsely in the matter touching which the defendant impugned his veracity, his testimony must have been intentionally and corruptly false upon a point material to the issue, it is not necessary that the declaration should alledge that the slanderous words imputed the crime of perjury, according to the laws of this State.

Writ of Error to the Circuit Court of Bibb.

THIS was an action for slander at the suit of defendant in error. The declaration contains three counts; in the first of which it was charged that an action was pending in the circuit court of Bibb, wherein the State was plaintiff and Augustus A. Whatly was defendant, in which, on the 6th of April, 1842, a trial was had in due form before the judge of

that court and a jury of that county, during the progress of which trial, the plaintiff in this cause was sworn and examined as a witness on behalf of the defendant, Whatly. On that trial it was material "to inquire into and investigate the character of one Anderson C. Whatly for truth and veracity," and the plaintiff did "depone and say that he knew the character of said Anderson C. Whatly for truth and veracity in the neighborhood in which he lived," and that he "would be believed and was entitled to credit in a court of justice, on his oath." The count then avers that the defendant well knowing the premises, but greatly envying the good repute of the plaintiff, and contriving and intending to injure the plaintiff, &c. and to subject him to the pains and penalties of perjury, and also to vex and harrass and wholly ruin him, on the 24th day of May, 1845, at, &c. "did falsely, wickedly, maliciously, corruptly and wilfully publish and speak, and caused to be published of and concerning" the plaintiff, and of and concerning the action which had been so pending, in a certain discourse which he, the defendant, then and there had with the plaintiff, of, and concerning him, the plaintiff, in the presence and hearing of divers good and lawful citizens of this State, and of, and concerning the evidence he gave on the trial of the action abovementioned, these false, malicious and defamatory words: "You swore a lie, and I will swear to it;" meaning and intending thereby to charge the plaintiff with having sworn a lie in said cause, and that he thereby committed perjury.

The words charged in the second count to have been spoken of the plaintiff by the defendant, are: "You swore a lie to my knowledge, and I will swear to it," intending thereby to charge the plaintiff with having committed perjury. In the third count the words charged to have been spoken, are: "He swore a lie to my knowledge," intending, &c. as in the preceding.

To this declaration the defendant pleaded that the plaintiff instituted another action against him in the circuit court of Bibb, for the same identical cause in the writ and declaration in this suit mentioned, as by the record and proceedings thereof, remaining in that court will more fully appear; which suit was still pending when the writ in this action

was issued and executed, and for a long time thereafter. The plea concludes with a verification, and prays judgment of the writ and declaration, and that the same may be quashed. This plea is verified by the defendant's affidavit.

The plaintiff replied, that the writ and declaration ought not to be quashed by reason of any thing alledged in the plea, because he says, that at the time of the commencement of his action, he had not then pending, as alledged by the defendant, an action commenced by him against the defendant for the same identical cause as that mentioned in his writ and declaration, nor at any time thereafter in manner and form as alledged in the defendant's plea: and this he prays may be inquired of by the country.

There was a demurrer to the replication, which was overruled, and an issue submitted to the jury, on which a verdict was returned for the plaintiff. Thereupon the defendant demurred to the declaration, which being overruled, he pleaded "not guilty," and the cause was tried by a jury, who returned a verdict for the plaintiff, assessing his damages at two hundred dollars, and judgment was rendered accordingly.

A. B. MOORE, for the plaintiff in error, made the following points: 1. The replication is the denial of the existence of a record such as the defendant relied on, and should have concluded not to the country, but with a prayer that the matter be inquired of by the court. [1 Went. Plead. 45; 1 Dunlap's Prac. 499; Steph. Plead. 101; 102.]

2. As the declaration does not alledge any special damage, it should have averred that the slanderous words were such as if true, subjected the plaintiff to the pains and penalties of perjury according to the laws of this State. [2 Hump. Prec. 774.]

No counsel appeared for the defendant.

COLLIER, C. J.—It is certainly true that the plaintiff may reply *nul tiel record* to a plea of the pendency of another action, [1 Saund. on Plead. 18,] and such is the form of the replication to which the counsel for the plaintiff in

error has referred in 1 Wentworth. The plea of *nul tiel record*, should conclude with a verification by the record, and where the replication merely denies the existence of a record, which is relied on by the plea as a defence to the action, it should contain a similar conclusion. [2 Saund. on Plead. 754, 755; 1 Chit. Pl. 556, 557.] But where the plea contains matter of fact as well as matter of record, it should not conclude with a verification by the record, but with a verification to the country. [Id.; 1 Saund. on Pl. 18; 6 Johns. Rep. 26; 2 Id. 227.]

In the case before us, the replication does not merely put in issue the existence of a record to establish the fact relied on by the plea, but it goes beyond this, and in effect affirms that if there was another suit, the record of which would show it to be identical with the present, yet in point of fact, the causes are different. Or in other words, it is so framed as to allow the plaintiff upon the production of a record by the defendant which would support his plea, to show that the matter in controversy in the suit first instituted was not identical. That such extrinsic proof would be admissible, we think, does not admit of doubt.

In Robinson v. Windham, 9 Porter's Rep. 397, it was held that under the general issue in an action of assumpsit on a note, it was allowable for the maker to show that the property for which the note was given was not such as the payee warranted it to be; and that in an action subsequently brought to recover damages for a breach of the warranty, a special plea was good which alledged that the same matter had been litigated in the suit upon the note, and the judgment therein rendered, remained unreversed, or in any manner vacated. In later adjudications, we have determined that it was competent for parties to look out of the record and show by extrinsic proof that any matter within the issue was a subject of controversy. And such is unquestionably the weight of authority.

This course of reasoning indicates, that where there is a record which would establish the plea of another action pending, the plaintiff is not bound to deny its existence, but if in truth the causes are dissimilar, he should be allowed to show it.

And to let in such proof, the replication should be adapted to it.

It may however be supposed, that the replication should contain a new assignment of the cause of action. Where a person has two causes of action for a breach of contract, for one of which he has already obtained a judgment, and to an action for the other the defendant pleads the judgment recovered, the plaintiff should new assign, and show that the action was brought for a different breach of contract from that for which the judgment pleaded had been obtained. In all cases, it is said, where the defendant applies his justification to a different cause of action from that to which it is applicable, the plaintiff must new assign. [6 T. Rep. 607; 3 B. & C. Rep. 235.] New assignments are also adopted for the purpose of ascertaining with greater precision and exactness, the place or time which has been alledged only generally in the declaration. [2 Saund. on Pl. 684; 1 Chit. Pl. 601, *et post.*] But we are not aware that the doctrine of new assignment has ever been applied to a plea in abatement, such as that we are considering. Be this however as it may, it cannot be necessary for the plaintiff to new assign, in order to let in proof of an extrinsic fact, which does not contradict, but merely limits the operation of a record. The citations from 1 Chitty, 614-15, and 6 Johnson, *ut supra*, recognize the sufficiency of such a replication. This view of the question has led us to the conclusion, that the replication is an answer to the plea, and the conclusion proper.

The demurrer to the declaration is not several, but to all the counts jointly, and if either of them was good, it was rightly overruled. The words charged in each count to have been spoken, are *per se*, actionable, and without considering whether the second and third counts contain the necessary allegations, we think the first certainly does. If it be objectionable in any thing, it is in being too verbose. There was no necessity for the declaration to alledge specifically, that the slanderous words were such as imputed the crime of perjury, according to the laws of this State. This is apparent, and such an allegation could not have made it more obvious. The false swearing which the defendant is said to have imputed to the plaintiff was, *first*, in deposing that he was ac-

quainted with the character of the impeached witness, and *second*, in expressing the opinion that from such knowledge he was worthy of credit. If he was unacquainted with the witness' character, it is perfectly clear that his testimony was false, and the inference would be, that it was intentionally, and of course corruptly so.

The consequence is, that the judgment must be affirmed.

PETTY v. WAFFORD.

1. When an administrator is cited by a husband in right of his wife, omitting her name, and a settlement is submitted to, it is a waiver of all irregularities in the mode of citation.
2. When a settlement is made, and the administrator fails to require those claiming distribution to propound their interest, he will not be heard on error, to complain that their interest is not shown by the record.
3. It is irregular to decree distribution in the name of the husband, only for the wife's distributive share. Whether amendable in the appellate court—*quere?*
4. When one claims as assignee of a distributee, the sum due in this character, cannot be joined with a sum due to him in right of his wife.

Writ of Error to the Orphans' Court of Limestone.

PETTY, as the administrator of the estate of Mildred Petty, was cited by the judge of the orphans court of Limestone county, at the instance of Wafford, in right of his wife, one of the heirs of said Mildred Petty, to appear and show cause why a final settlement of his administration should not be made. The citation is returnable to the 2d Monday of February, 1845. No order was taken on the return day, but afterwards, on the 17th February, it is recited that Petty, the administrator, filed his accounts and vouchers for final settlement. Whereupon it was ordered, that publication be made for the space of forty days, in, &c., requiring all persons in

any way interested in said estate, and settlement, to appear at a court to be held on the first Monday of April, then next, to show cause why the said settlement should not be made, and admitted to record. The cause seems to have been regularly continued, from time to time, until the 16th March, 1846, when the advertisement is recited as being proved to the court, and the settlement and distribution of the estate was made. "No one objecting to the settlement or distribution," it was ordered, "that the same be, and the same is hereby confirmed, and ordered to be filed, registered, and recorded in this court accordingly."

The judge then proceeds to certify, that on this settlement the balance due from the administrator was \$3,449 47, to be distributed among the eleven heirs, to wit: John Wafford, his portion and Thomas Petty's portion, which has been transferred to him, the said John Wafford, say \$627 16, but he acknowledges that he has received it all except \$28 54, therefore has judgment only for that amount. There is distributed to Andrew D. Wafford, in right of his wife, Mildred, his portion, and the portion of Bradford T. Brewer, in right of his wife Rebecca, which he has transferred to said Wafford, say \$627 16. And there is distributed to James W. Halley, in right of his wife Patsey, and to Hillyard Petty, Phillemore Petty, Abner T. Petty, Rufus Petty, George Petty, and Isaac N. Petty, each \$313 58, and which they, and each of them have judgment for.

The administrator sues out this writ of error, and here assigns that the court erred—

1. In ordering the citation in the name of John Wafford alone.

2. In sustaining proceedings by Wafford alone to recover the distributive portion of his wife.

3. Because there was no notice, or an insufficient one, for the settlement.

4. It does not appear who were the distributees, or that those are so in whose favor decrees are made.

5. The interest of these persons was not propounded to the court.

6. In rendering judgment for Wafford for the distributive portion of Thomas Petty.

7. In decreeing to John Wafford the distributive portion of his wife, and in not decreeing in favor of husband and wife.

8. In decreeing in favor of Andrew D. Wafford, and James H. Haley, severally, for the distributive share of their respective wives, without joining the wives in the decree.

9. In not decreeing in favor of the husband and wife for the portions of the female distributees.

10. In not decreeing in favor of Thomas Petty and Bradford T. Brown and wife.

11. Because the judgment is uncertain and insufficient.

12. Because the judgment is joint rather than several.

13. Because the court had no jurisdiction.

E. J. JONES, for the plaintiff in error.

GOLDTHWAITE, J.—1. The errors assigned in this cause are so numerous as to make it inconvenient to examine each in detail, but such of them as question the regularity of the mode by which the administrator was cited to appear, may be disposed of with the remark that they do not affect the proceedings in the least degree. Any one interested in the settlement of an estate is entitled to cite the administrator to make distribution, after the lapse of eighteen months from the grant of administration, and the administrator may either contest the right of the party thus to cite him, or he may proceed to settle the estate by citing such others as he wishes to conclude by the settlement. [Harrison v. Harrison, 9 Ala. Rep. 470.] In this instance the administrator, instead of contesting the right of Wafford to cite him, appeared and submitted to proceed, and in doing so waived any irregularities which might have been urged against their proceeding in the cause.

2. Of a kindred nature are all the objections urged to the final decree, on the score that distribution is decreed to improper persons, assuming to have a derivative title to the distributable assets. It is true the several parties, whether claiming in their own right or as the assignees of others, having similar rights, do not propound their interests, but the answer

to all this is, that the administrator was present, and did not require them to do so. He cannot now be permitted to assert there is error in this particular. [McRae v. Pegues, 4 Ala. Rep. 158; Graham v. Abercrombie, 8 Ib. 552.]

3. There is error, however, in the mode in which judgment is given, in the names of the husbands only, when the right of distribution arose in right of their respective wives. This applies to the two Waffords and Holley, whose wives should have been joined in the judgment, as the respective rights would survive in the event of the death of the husband. Whether this error would be sufficient to produce a reversal, as was the case under similar circumstances, in Crenshaw v. Hardy, 3 Ala. Rep. 653, or would be matter of amendment, as is intimated in Parks v. Stonum, 8 Ala. Rep. 755, we will not now undertake to determine, for if the latter only, there is nothing to amend by, as the name of the wife of John Wafford is not disclosed in the record.

The consequence is, there must be a reversal of the judgment, so far as it ascertains the debt in favor of the husbands, and remanded, that the proper judgments joining the wives may be entered. Of course the errors do not go to the matters of settlement.

4. There is another error, not covered however by the assignments, but which will be developed as soon as the proper entry is made. John Wafford, in his own right, as assignee of Thomas Petty, is probably entitled to a judgment, as well as himself and wife. The same remark will apply to Andrew Wafford, who is entitled to judgment in his own right as the assignee of Brewer and wife. It would be impossible to correct the first of these errors, even if the others were amendable.

Reversed and remanded.

VENABLE v. THOMPSON.

1. A written instrument may be contradicted by the party making it, when offered in evidence in a suit, to which a stranger to the instrument is a party.

Error to the Circuit Court of Lawrence.

DETINUE by Elbert H. Thompson, against Molly Venable, for a female slave named Lucinda.

Upon the trial, the plaintiff introduced testimony, tending to establish, that in the year 1833, the defendant claimed to have a life estate in the slave Lucinda and others, as her separate estate, or held by her husband in right of his wife, the remainder being in one Littleberry H. Jones, and also offered in evidence a bill of sale, for the slave sued for, from Larkin Venable, her husband, to said Jones. He also offered to prove by one Thomas A. Strain, that the consideration of the bill of sale, was the release by Jones to Venable, and to the defendant, of his estate in remainder, to the other slaves, and also to prove acts and declarations of the defendant, both before and after the date of the bill of sale, to prove her assent to the contract, which was objected to by the defendant, but permitted to go to the jury.

The plaintiff then read to the jury, a bill of sale dated 19th November, 1833, for the slave Lucinda, from the witness Strain to him, for the consideration of \$400, which contained a warranty of title, and having released him from all claim or liability, offered to prove by him, that when he sold and delivered the slave Lucinda to the plaintiff, and received the purchase money, he acted as the agent of Jones, and only intended to bind Jones, and so informed the plaintiff, and that it was accepted as such by him; to which the defendant excepted. These matters are now assigned for error.

W. COOPER, for the plaintiff in error.

L. P. WALKER, contra.

ORMOND, J.—It does not appear from the bill of exceptions, what was the consideration, if any, expressed in the bill of sale from Venable to Jones, and we cannot say whether the court erred or not, in the proof admitted. That such proof is admissible in many cases, see *Graham v. Lockhart*, 8 Ala. 24.

The objection to the testimony of the witness, Strain, is, that it contradicted the bill of sale made by him to the plaintiff, by which he assumed to sell the slave as his own, and not as the agent of Jones. There can be no doubt, that in an action by the plaintiff against Strain, upon this warranty, he would not be permitted to show that he did not intend to bind himself, but was acting as the agent of another person. But this rule is confined in its operation, to the parties to the written instrument; where it comes in question collaterally, in a suit in which a third person, a stranger to the writing, is a party, neither party is estopped from contradicting it, or from proving facts inconsistent with it. The interest of the witness having been released by the plaintiff, he was a competent witness, and any discrepancy between his testimony and his previous written contract in relation to the same matter, would go to his credit.

Nor do we know of any rule of public policy which would exclude it. He is not swearing here to sustain a title emanating from himself, but to prove that he never had or claimed title to the slave.

Let the judgment be affirmed.

LEDBETTER v. CASTLES, ET AL.

1. The act which gives a summary remedy against a justice of the peace, for the failure to pay over on demand any money received or collected by virtue of his office, does not extend to their sureties, so as to authorize a judgment to be rendered against them with their principals on motion: consequently, a motion for judgment in such case, against a justice and his sureties is unauthorized, and may be denied *in toto*.
2. *Semble*. Where the amount received by a justice of the peace in virtue of his office, together with the damages given by statute for failing to pay it over, exceed fifty dollars, the circuit court may entertain jurisdiction of a motion against him.
3. Where a judgment effects the proper result, no matter by what erroneous reasoning it may have been induced, it will not be reversed.

Writ of Error to the Circuit Court of Pickens.

THIS was a motion for judgment at the suit of the plaintiff in error against Wm. Castles as a justice of the peace, and his co-defendants as his sureties, in an official bond, for the sum of \$32 04, the balance due on a promissory note collected by him in his official character, with ten per cent. damages *per month* from the 28th February, 1842, the day on which a demand was made. The defendants demurred to the motion, and the court dismissed the same, without costs to either party, upon the ground that it had no jurisdiction of the case.

B. W. HUNTINGTON, for the plaintiff in error, made the following points:

1. By the constitution of Alabama, the jurisdiction of justices of the peace is limited to cases where the amount in controversy does not exceed \$50. [Art. 5, § 10; *Pruit v. Stuart*, 5 Ala. 112.]

2. Where the amount of the judgment to be rendered against the justice exceeds \$50, the circuit or county court has jurisdiction by statute. [Clay's Dig. 362, § 18.]

3. The statute of 1824, against constables, [Clay's Dig. 219, § 88,] is of like character, and gives jurisdiction to the circuit and county courts expressly. It has so been construed by this court, "when the amount *sought to be recovered* exceeds \$50." [Johnson v. Petty, 5 Ala. 113.]

COLLIER, C. J.—The act of 1829 provides that if any justice of the peace shall fail or refuse to pay on application any money received or collected by virtue of his office, to the plaintiff, &c. judgment may be entered against him upon motion before any other justice of the peace of the county in which he may reside, for the amount so received by him, with ten per cent. a month damages thereon—three days' previous notice being given of the motion: "*Provided*, the amount of the judgment so rendered shall not exceed \$50; and in all cases where the amount exceeds that sum, the same remedy shall be had before the county or circuit courts, with damages thereon as aforesaid." [Clay's Dig. 362, § 18.] When this statute was passed, there was no law which required justices of the peace to give bond and security for the performance of their official duties; but the act of 1839 first made it necessary. Yet neither that nor any subsequent enactment extended the summary remedy against justices, to their sureties; and certainly there is no principle of construction which warrants its extension by the court.

Although the notice was addressed to the justice and his sureties, yet it was entirely competent to have submitted a motion against the justice alone, but having included all in the motion, the plaintiff gave form to the proceeding, and made that *joint* which might have been either *joint* or *several* at his election. It was competent for the defendants to have demurred to the motion, because it was unauthorized against the sureties, and for this cause the court should have sustained the demurrer. The judgment in its result is proper, though if the court repudiated the case upon the ground that the balance of the money alledged to be in the justice's hands did not exceed \$50, when it is obvious that the damages sought to be recovered, if added to the balance would make a sum largely more, the reason is insufficient to sustain its judgment. The damages, like interest, are merely acces-

sorial, and if the default contemplated by the statute is shown, in a proceeding against the justice alone, the plaintiff is entitled to recover them. The principal, interest and damages, make the aggregate of the plaintiff's demand, and must all be looked to upon a question of jurisdiction. We have repeatedly held that a judgment proper in itself, will not be reversed, because the court assigns an insufficient reason for its rendition. The judgment of the circuit court is consequently affirmed.

CAMP v. HATTER.

1. When the transferee of a debt is summonsed in an attachment suit after the answer of the garnishee, he is compelled, on the issue with the attaching creditor, to show the debt was transferred to him previous to the service of garnishee process, and the court may require this question to be presented by the issue.
2. The notice to the transferee may be ordered at any time after the coming in of the answer, and before the cause is ended by the termination of the suit; therefore, an order at the same term when final judgment is rendered against the debtor, is regular, and sufficient to continue the cause against the transferee.
3. The mere production by the transferee of a note made by the garnishee, with an assignment on it by the attachment debtor, is not sufficient to prove the note was assigned previous to the service of garnishee process. It is with the transferee to show when his interest was acquired.
4. A transferee contesting the creditor's right to condemn the transferred debt, is liable for costs, if the issue is found against him, and a judgment condemning the debt in the hands of the garnishee, to the payment of the judgment debt and costs, and giving costs against the transferee is regular.

Writ of Error to the Circuit Court of Greene.

WILLIAM R. HAMLET was summoned by garnishee process as the debtor of John L. Hatter, in an attachment at the suit

of Priscilla Hatter, and at the September term, 1839, appeared and answered that he was indebted to the defendant in attachment, in the sum of \$650, by note, due 1st January, 1841. Judgment was not rendered in the attachment suit until September term, 1841, when the plaintiff recovered from the defendant in attachment \$409 24, besides costs of suit.

At the March term, 1841, the garnishee asked and obtained leave to amend his answer, and then amended the same by stating, that a few days after his former appearance and answer, he was served with a notice by J. B. Camp, that the note described in his former answer had been assigned to him by John L. Hatter, and that he looked to the garnishee for payment.

At the next term of the court—September term, 1841—an order was made, that notice should be issued for Camp “to appear and answer to a transfer of the note of the said garnishee, payable to John L. Hatter, and also an order of publication,” the said Camp being a non-resident.

The cause was continued against the garnishee down to April term, 1844, when Camp appeared, and the plaintiff alleged, “that the assignment of a certain note, &c. by Hatter to Camp, was not a good, valid, and sufficient assignment of said note, so as to vest the right to said note in said Camp, but that the money mentioned in said note was subject to pay the judgment of the plaintiff against said Hatter.

Camp, on his part, asserted that Hatter, on or about the 1st of March, 1839, assigned the said note, and averred the assignment was valid.

The plaintiff objecting to this issue, the court ruled the defendant should amend the same, so as to assert that the assignment was made previous to the service of the garnishment, and it was so amended. A verdict was found for the plaintiff, on which judgment was given against Hamlet for the sum of the judgment and costs against Hatter, and against Camp for the costs of the proceedings against him.

At the trial of the issue, the defendant produced the note of Hamlet, indorsed by John L. Hatter, in blank. He then proved the hand-writing of the indorser, and also that Ham-

Camp v. Hatter.

let had notice of the indorsement of the note to Camp, in August, 1839, a few days after the service of the garnishment. The plaintiff introduced no other evidence than his judgment against Hatter.

The defendant asked the court to charge the jury, that if the indorsement on the note was made by Hatter, the note being in possession of, and produced by the defendant, it was *prima facie* evidence that the note was indorsed at the time it was made, and the indorsement should be considered as being dated with the note, unless rebutted by other testimony.

This was refused, and the court charged the jury, the indorsement was not even *prima facie* evidence of the time of the transfer of the note to Camp, and that it was incumbent on him to show the note was indorsed to, and held by him, before service of the garnishment on Hamlet. The defendant excepted to the charge given, as well as to the refusal. He now assigns that the court erred—

1. In the issue ordered.
2. In ordering a notice to Camp at a term subsequent to that at which the garnishee made his answer.
3. In the refusal to charge as asked, and in the charge given.
4. In the judgment rendered.

A. GRAHAM and PIERCE, for the plaintiff in error, insisted—

1. The proper issue between a creditor and the transferee of a debtor, to contest the validity of an assignment under the act of 1840, (Clay's Dig. 60, § 4,) is, for the plaintiff, after the appearance of the party, to alledge that the transfer or assignment to him is invalid. A denial of this by the defendant makes the issue. [Godwin v. Brooks, 6 Ala. Rep. 836; Graves v. Cooper, 8 Ala. Rep. 814.]

2. To require a different issue, we must assume that every transfer of a note by a debtor to a third party is fraudulent.

3. The plaintiff having the affirmation of the issue, the burden of proof, to show that the money due on the note, was liable to satisfy his judgment, was upon him. [Phelps v. Hartwell, 1 Mass. R. 71; Blaney v. Sergeant, 1 Ib. 335;

Buckminster v. Pony, 4 Ib. 593 ; Phillips v. Ford, 9 Pickering, 39.]

4. The publication, to make Camp, who was a non-resident, a party, should have been for six months ; and this was not cured by the appearance of the attorney. [Sheppard, et al. v. Buford, 7 Ala. R. 90.]

5. If the garnishee, before final judgment, makes known to the court, that he has received notice of a transfer of the note, which is the evidence of his indebtedness to the defendant, judgment cannot be rendered against him, until the court determines the validity of the assignment. [Foster v. White, 9 Porter, 221 ; Payne v. The Mayor and Aldermen of Mobile, 4 Ala. R. 333.]

6. The proof offered by the defendant of the assignment of the note was sufficient.

R. H. SMITH, for defendant in error.

1. That the issue was under the control of the court, and the one formed was the only proper one.

2. The assignee holds the affirmative, and by the rules of pleading the onus is on him.

3. The issue could be formed at any time before garnishee was discharged. The decisions of this court in relation to when summary proceedings may be taken against a sheriff, are thought analagous. [Burton, et al. v. Peck, 1 S. & P. 486 ; Kirkman v. Harkins, 1 Port. 22.]

4. The assignment in blank was no evidence of when, or on what consideration it was made, unless it had been the foundation of an action, so as to bring it under the operation of our statute.

5. The true construction of the statute, under which these proceedings are had, (Clay's Dig. 63, § 40,) only authorizes the assignee to come in and litigate when the garnishee discloses a notice of assignment *made previous* to the service of the garnishment ; and therefore plaintiff below was entitled to judgment on answer, and plaintiff in error cannot complain.

GOLDTHWAITE, J.—1. When an attachment is levied by garnishee process, the lien created by it attaches at the

time of the summons, and the right of the debtor to make a transfer is at once interrupted. A consequence of this principle is, that the issue between the garnishee and the attaching creditor, puts in question his indebtedness at that time. Our statutes permit the garnishee to suggest, that the interest in the attached debt has been transferred to another; and the creditor is allowed to substitute the transferee in the place of the garnishee, by giving him notice. [Dig. 63, § 39, 40.] It is evident, as it seems to us, that the transferee of a debt when summoned under the statute, stands precisely in the condition of a purchaser from the debtor in attachment, and in consequence of this relation, is compelled to show that his title to the attached debt accrued before the lien of the attachment was rendered effectual by the summons of the garnishee. A different rule would place the purchaser or assignee of a debt in a more favorable condition than the purchaser of other chattels. We have no hesitation then in coming to the conclusion that this issue was properly directed, as it puts the question of transfer so as to relate to the time of the summons.

2. It is true the summons to the transferee in this case was ordered to be issued at a subsequent term to that when the answer came in, but we think this was sufficiently regular. The principal suit was not then finally disposed of, or rather it was then that a judgment was given against the debtor in attachment, and until then the necessity for ulterior proceedings against the garnishee, or transferee, could not be certainly known. We have heretofore held, that a judgment against the garnishee, or other proceedings tending to a judgment, may be taken at the term when judgment is given against the principal debtor. [Leigh v. Smith, 5 Ala. R. 583.]

3. With respect to the charge asked, as well as the one on which the cause was submitted to the jury, we think there was no error. The indebtedness of the garnishee was admitted by his answer, and as the transferee, Camp, claimed an interest in the assigned note, superior to the right of the plaintiff in attachment, it rested with him to show it affirmatively. Indeed, to hold the party to proof, that the note was not assigned when the garnishment was served, would be to impose proof of a negative. In the correlative case of a levy

on personal estate, which is claimed by a stranger, the proof is cast on him to support his claim, after the plaintiff has made a *prima facie* case, by evidence that it once belonged to the execution debtor. We think the same principle holds good when the contest is between the creditor and the assignee of a debt. [Davis v. Clayton, 5 Hump. 446.]

4. When Camp contested the right of the plaintiff to condemn the debt in the hands of the garnishee, he became a party litigant to the proceedings, and in that character liable for costs if unsuccessful. Hence he is only condemned to the costs arising out of the contest, and this we think entirely proper. In other respects the judgment entry seems open to no objection, as it condemns the debt in the hands of the garnishee to the payment of the principal judgment and costs.

On the whole case we can see no error. Judgment affirmed.

GIVENS & Co. v. ROBBINS, PAINTER & Co.

1. The act enabling plaintiffs to commence another action within a year after a reversal of a previous judgment, [Clay's Dig. 328, § 86,] applies to a case, where by the action of the inferior court, the cause was discontinued as to two of the defendants, and thus caused a reversal of the judgment as to the other defendant, although not within the letter of the statute.

Error to the Circuit Court of St. Clair.

DEBT on promissory note, by the defendants in error, against Edward L. Givens, Hugh L. Givens, and William T. Givens. An agreement was entered into between the parties, that any matter which the defendants could jointly or severally plead in bar of the action, should be considered

as pleaded, and the proper replications be considered as filed by the plaintiff.

From a bill of exceptions, it appears that it was in proof, that on the 1st April, 1842, the plaintiff commenced a suit, on the same note, against the same defendants, in the circuit court of Benton county. That at the April term, 1843, the cause was tried, and the defendants' counsel suggested to the court, that Edward L. Givens and Hugh L. Givens, had since the commencement of the suit applied for the benefit of the bankrupt law, and thereupon moved the court for a continuance of the cause, which was objected to by the plaintiff's counsel, but the cause was continued as to them, and upon the verdict of a jury the court rendered a judgment, against the remaining defendant. From this judgment a writ of error was prosecuted to this court, by which it was reversed at the January term, 1844, upon the ground that by the proceedings in the court below, the cause was discontinued as to all the parties. [Givens v. Robbins, Painter & Co. 5 Ala. 676.] The present suit was commenced on the 15th March, 1844.

The defendants under the agreement relied, and insisted upon the statute of limitations of six years, as well as upon the general issue.

This being all the evidence, the court charged the jury they must find for the plaintiffs. William T. Givens, by his counsel, moved the court to charge, that they ought not to find against him, upon the evidence, which charge the court refused to give, and the defendants excepted to the charge given and to that refused. This is the error assigned,

S. F. RICE, for plaintiff in error.

T. A. WALKER, contra.

ORMOND, J.—The statute of limitations was a bar to the recovery on this note, unless the statute of this State [Clay's Dig. 328, § 86] prevents the bar from operating. It is as follows: "If in any of the said actions specified in any of the preceding sections of this act, judgment be given for the plaintiff, and the same be reversed by writ of error; or if a verdict pass for the plaintiff, and upon matter alledged in arrest of judgment, the judgment be given against the

plaintiff, then the said plaintiff, his or her heirs, executors, or administrators as the case shall require, may commence a new action within one year after such judgment reversed, or given against the plaintiff, and not after."

It is clear that this case does not come within the letter of this act, and the only inquiry is, whether it is within its spirit and intent, though not embraced by it in terms. The 21 James I, is the original of our statute, and doubtless of those of all the States, the section now under consideration being a literal transcript of the fourth section of the English act, omitting the part relating to outlawry; and it has been held, that where the action was brought within six years, and then the plaintiff died before judgment, the six years being then expired, his executor might bring a new action upon the equity of the fourth section. [Mathews v. Philips, 2 Salk. 425; Kinsey v. Hayward, 1 L. Ray, 434.] So where a writ abated by the marriage of an administratrix, it was held that a new suit instituted by herself and her husband, was within the equity of the statute. [Note to Karver v. James, Willis' Rep. 259.]

In the United States an equally liberal view of the statute has been taken. It has been held in Kentucky, that where a party sued by motion within the period, and pending the suit the time expired, after which his motion was dismissed, he might commence another action under the equity of the statute. [Lansdale v. Cox, 7 J. J. M. 394.]

So in North Carolina, it has been considered that a non-suit was within the intent, though not within the letter. [Skillington v. Allison, 2 Hawks' L. & E. R. 347.] In Phelps and Bell v. Wood, 9 Vermont, 404, it was applied to a discontinuance, without fault of the plaintiff; and in Spear v. Newell, 13 Id. 288, to an involuntary non-suit. To the same effect is Coffin v. Cottle, 16 Pick. 383.]

The plaintiff in error has cited many cases, which establish that where there has been a discontinuance of the cause, occasioned by the omission to continue the process, it will not prevent the bar of the statute, to another suit brought within a year after such suit has been determined. Also cases, where a voluntary non-suit has been held to have the same effect, and other kindred cases, of a failure to obtain a

judgment in the first suit, by the negligence, omission, or mistake of the plaintiff. To this effect are the cases of *Joins v. Schooley*, 3 Harrison, 269; *Hopkins v. McPherson*, 2 Bay, 194; *Sherman v. Barnes*, 8 Conn. 143; *Davis v. West*, 5 Wend. 65; *Delaplain v. Crowninshield*, 3 Mason, 330; and to the same effect others might be added.

The manifest intent of the legislature, in the enactment under consideration, was to prevent the bar from operating, where the plaintiff, having sued in time, has been prevented from collecting his debt, by an error of the court, or by a mistake, which did not impute neglect or laches to him, and it is therefore entirely reasonable to suppose, that the instances put in the statute are by way of example, and that it was not intended to confine the remedy to the precise state of facts there enumerated. Here, the plaintiff has been endeavoring to recover his debt, through the means provided by law for that purpose, and has been prevented from doing so by the error of the court, which rendered his judgment against one of the defendants unavailing, and prevented him from obtaining a judgment against the other two. In our opinion this brings the case fully within the intent and meaning, though it is not within the letter of the statute; and such appears to be the construction put upon similar statutes elsewhere, under like circumstances.

The repose of society certainly requires that stale demands should not be enforced, because after a great lapse of time, it may be difficult, if not impossible, to prove a payment or other discharge where it really exists. But this consideration is entitled to no weight, where the creditor has not slept on his rights, but has for years been actively engaged in enforcing them; and has only been prevented from doing so, by the erroneous action of the court. Having given to this case the fullest consideration, we feel satisfied the judgment must be affirmed.

RIGGS, ET AL. V. THE BANK OF THE STATE.

1. The statute having prescribed the term to which a writ of error shall be returned, the writ will not be dismissed, or an affirmance of judgment denied, because it is, upon its face, made returnable to a day after the court commences its session.
2. The time when a writ of error is returnable need not be recited in a bond conditioned for its successful prosecution, and if recited, is not an essential part of the obligor's contract; so, that if the writ be such as to authorize a judgment of affirmance against the plaintiff in error it may be rendered against his sureties also.

THE defendant moved the affirmance of a judgment which it had recovered against the plaintiffs, in the circuit court of Tuscaloosa, and produced a certificate in the form required by the statute, save only that it stated, the writ of error was returnable "on the first Monday in January next," succeeding the day when it was sued out. The writ was applied for and obtained, as the certificate recites, on the 3d day of July, 1846.

B. F. PORTER, for the motion, cited Clay's Dig. 308, § 13; Minor's Rep. 183; 4 Porter's Rep. 414.

B. W. HUNTINGTON and E. W. PECK, contra, cited 3 Stew. Rep. 331; 8 Ala. R. 490.

COLLIER, C. J.—The statute prescribes the term of the court to which writs of error are returnable, and it is not necessary that the writ should express any time for its return; for thought it be silent in this respect, it will effect the same legal purpose, as if it stated the term truly. If it states a term when no court is holden, the mistake cannot affect its validity; but will be treated as a matter altogether superfluous, and will be controlled and corrected by the statute. This was the view taken of the law, even previous to the

statute which authorizes the amendment of writs of error. [8 Porter's Rep, 53, 452.]

If the plaintiff in error had filed the writ with the transcript, the cases cited show that it would not have been dismissed; but the court would have taken jurisdiction of the cause in despite of an objection by the defendant. We cannot think that the omission of the plaintiffs to prosecute their writ of error places the defendant in a condition that it cannot have an affirmance, when it was sufficient to have authorized a revision of the case, if the plaintiffs had elected to prosecute it.

In respect to the bond, the recital in the condition of the time when the writ of error was returnable, is not an essential part of the obligor's contract—it might with perfect propriety have been omitted, without limiting to any extent the scope of their undertaking. The liability of the surety depends upon the fact, whether the plaintiffs in error prosecute their writ of error with effect, as the law prescribes—and it is for this they stipulate. For this the bond explicitly provides, and it cannot be vitiated by an immaterial recital.

The motion for an affirmance is therefore granted.

GLOVER, USE, &c. v. CHANDLER, ET AL.

1. Where a plea to a motion against the sheriff goes to the default, and it is not stated by whom pleaded, it will be considered as the plea of the sheriff.
2. When a motion is made against a sheriff and his sureties at the instance of the clerk of the supreme court for failing to return an execution, it is not essential the pleas asserting the return of the execution and payment should be verified by oath.

3. A plea that the money was paid before notice issued is good, without averring by whom or to whom payment was made.
4. No motion in such a case will be sustained after payment made and accepted, although it is made after the default.

Writ of Error to the Circuit Court of Perry.

MOTION made by the clerk of the supreme court, in the name of Glover for his use, against Chandler as the sheriff of Perry county and others as his sureties, for his failing to return a certain execution for costs issued from the supreme court. The parties appeared to the motion, and Chandler pleaded—1. That he was not guilty of failing to return said execution, as alledged in the notice. 2. That he paid the money which he was commanded to make by said execution before the issuance of said notice, and of this he put himself on the country.

The plaintiff demurred to both pleas, but his demurrers were overruled.

The plaintiff then replied to the second plea, "that if the said money was paid at all, it was so after the return day of said execution, and not otherwise."

The defendant demurred to this replication, and his demurrer was sustained.

Issue was afterwards joined on the pleas, and the defendant had a verdict.

The overruling the demurrers to the pleas, and the sustaining the demurrer to the replication, is now assigned as error.

DAVIS, for the plaintiff in error, insisted—

1. The first plea is defective, in not showing by whom it is pleaded. It does not deny the default, and should have been verified by oath. [Dig. 311, § 31, 32.]

2. The second plea is defective in not showing by whom it is pleaded, and is no answer to the motion, because it omits to show by whom or to whom the payment was made.

3. The replication is good, because it supplies a fact not shown by the plea, and which if shown, would have made it bad.

A. B. MOORE, contra, cited Governor v. Powell, June Term, 1846, to show the second plea contains sufficient substance.

GOLDTHWAITE, J.—1. Although all the defendants appeared to the motion, yet, as the cause for it is the alledged default of the sheriff, the officer is the proper party to contest the matter with the plaintiff. [Price v. Cloud, 6 Ala. Rep. 248.] The pleas pleaded, therefore, may be considered as pleaded by him.

2. It is supposed, however, that when the motion is made at the instance of the clerk of the supreme court, the pleas, whether denying the default, or asserting a discharge, should be verified by oath. The statute provides, that “on the trial of such a motion, when the execution has not been returned by the sheriff, &c. and received by the clerk of the supreme court,” his certificate of certain facts shall be received and shall dispense with the production of the execution and record, “unless such officer shall deny by affidavit, sworn to, that said execution ever came to his hands, or that it was returned to the proper office by due course of mail, or that the money could not be made on the execution, as the case may be.” We think it quite evident, that no change was intended in regard to the manner of pleading, and that a new mode of proof only is provided—the certificate on the part of the plaintiff, and the affidavit on the part of the sheriff—but we apprehend either party would be allowed, notwithstanding the statute, to resort to the ordinary and usual evidence.

3. It is true, the second plea omits to state when, or by whom, or to whom, the payment was made, but we consider any of these averments unnecessary, as the term payment *ex vi termini*, imports a legal payment, and if it is not made to the proper person, and at the proper time, it could scarcely be said to be a payment. [Governor v. Powell, 9 Ala. 36.]

4. It is supposed however, by the replication to the second plea, that if the money was paid by the sheriff, after the return day of the execution, that the clerk would, notwithstanding be entitled to his motion. We think otherwise. The intention of all those, and similar enactments, seem to be to

provide a summary remedy for the party to obtain satisfaction for an alleged neglect or default, and we can perceive no reason why the remedy should be extended to cover cases where satisfaction has actually been made and accepted. Such must be the inference from these pleadings, as it could not be truly asserted a payment had been made, which was not accepted by the other party.

Whether a creditor, or the clerk, in this instance would be allowed to refuse the satisfaction offered, and retain his statute remedy for damages, as well as principal, need not be determined. Judgment affirmed.

DAVIS v. ALLEN.

1. The law exempting certain articles from levy and sale, for the use of families, applies, whether the family is stationary, or moving from place to place. Nor would an intention on the part of the head of the family, to abscond from one part of the State to another, deprive the family of this privilege. Whether an intention even to abscond beyond the limits of the State, would make any difference—*Quere.*

Error to the County Court of Benton.

TRESPASS *vi et armis* by the plaintiff, against the defendant in error, for taking and carrying away a yoke of oxen, an ox cart, bed and furniture, and other household utensils.

The defendant by plea, justified under certain writs of attachment which came to his hands as an officer, and which he levied upon the property. To which the plaintiff replied, that he was a resident of Benton county when the attachment issued; that he was the head of a family, and that the articles levied on were exempt from levy and sale by law.

Upon the trial, as appears from a bill of exceptions, testimony was introduced tending to prove, that at the time of

the levy, the plaintiff was about removing from Benton county to the southern part of the State, or to some other part unknown to the witnesses.

The plaintiff's counsel asked the court to charge, that unless the jury believed from the evidence, that the plaintiff was about removing beyond the limits of the State, the fact that he was removing to another county of the State, would not deprive him of the benefit of the act exempting certain articles from levy and sale; which charge the court refused, and charged the jury, that if the plaintiff had no permanent place of residence within the State, such as persons of his occupation usually have, but was moving about from place to place, rendering his place of residence uncertain, he was not entitled to the benefit of the act.

That if he was in a flying condition, such as is usually called running away, even although he was not going beyond the limits of the State, he was not within the provision of the act. To all which the defendant excepted, and now assigns as error.

S. F. RICE, for the plaintiff in error, cited Hollinger v. Smith, 4 Ala. 369; Cothran v. Moore, 1 Id. 423; Toulmin v. Lessesne, 2 Id. 359; Sims v. Sims, 8 Porter, 449.

ORMOND, J.—The statute governing this case, provides, that certain articles of property which are described, “shall be retained by, and for the use of every family in this State, free and exempt from levy and sale, &c. [Clay's Dig. 210, § 47.] The policy of the law, secures the exempt articles from levy and sale, for the use of the family, every where within the limits of the State; and certainly it can make no difference, whether this exemption is claimed in Benton, in an adjoining, or remote county, as the right to retain the property so exempt, attaches to the family wherever it may be in the State; whether stationary, or in the act of moving from one part of the State to another; and it is certainly unimportant, whether a removal is about to be made openly or clandestinely. The intention of the head of the family, to abscond to avoid the payment of his debts, cannot affect the right of the family to property which the law exempts from

levy and sale, for the payment of debts. Nor indeed can we perceive, how an intention avowed, of leaving the State would alter the case ; for so long as the family remain within the State, the prohibition to levy on the exempt articles must be in force. This question, however, though mooted in the court below, does not appear to have been expressly decided, and we shall therefore abstain from the decision of it at this time.

The judgment of the court was probably induced, by confounding the act of 1843 [Clay's Dig. 210, § 48] with the preceding section we have just commented upon. The last cited act secures to "permanent and settled families," forty acres of land, from levy and sale by execution or other legal process. This act is entirely distinct from the preceding, in its provisions and objects, and was properly confined to those having a permanent freehold residence. The articles exempt by the previous law are those which are essential to the comfort, if not to the subsistence of the family, whether stationary or moving from place to place. There is not a word in the act affording the slightest countenance to the construction put upon it in the court below, and its judgment must be therefore reversed, and the cause remanded.

ANDRESS v. LONGMIRE, ADM'R, &c.

1. After an appeal is taken by the defendant from the judgment of a justice of the peace, the justice has no authority, even before he returns the papers, to receive the amount he adjudged to the plaintiff; yet if he receives it and pays it to the plaintiff—the latter accepting it and directing the appeal to be returned, that he may recover the damages which the law gives in cases where the defendant's object was delay: by receiving the sum due on the judgment, the plaintiff must be held to have waved all right to the damages—these being recovered as a consequence of a subsisting debt or demand.

2. Although the appellate court has a discretion in a proper case, whether in an appeal from a justice of the peace, it will award the damages given for delay—yet if they are adjudged when they are under no circumstances recoverable, the judgment may for that cause be reversed on error.

Writ of Error to the Circuit Court of Monroe.

THE defendant in error recovered a judgment against the plaintiff before a justice of the peace, for \$26 42, from which the latter appealed to the circuit court. A short time previous to the sitting of the court to which the appeal was returnable, the appellant paid the amount of the judgment to the justice, who at the same time claimed fifteen per cent. damages thereon, but the appellant refused to pay it. The day after the receipt of the money by the justice, he paid it over to the party for whose use the suit was brought, who received it, insisting upon his right to be paid the 15 per cent. and directed the appeal to be returned to the circuit court. The appellants prayed the court to charge the jury, that if they had paid the amount due the appellee to the justice, and the latter had paid it over as shown by the proof, then they (the jury) should find for the appellants. This charge was refused, and the jury were instructed, that if at the time of the payment by the justice of the peace to the appellee, he claimed the fifteen per cent. damages, then they should return a verdict for the appellee. To the charge refused, as well as that given, the plaintiffs in error excepted, and their exceptions are duly sealed and certified to this court.

LESLIE, for the plaintiff in error, insisted, that the debt having been paid, the fifteen per cent. damages were not recoverable, but if they were, the charge given could not be supported. [Clay's Dig. 315, § 13; 2 Porter Rep. 48.]

B. F. PORTER, for the defendant in error. The appellant cannot avoid the payment of fifteen per cent. damages, which the law imposes as a penalty for delay, by satisfying the judgment of the justice before the return of the appeal. But if the circuit court erred in giving damages, it was a matter of discretion, not revisable on error. [3 Dev. Rep. 468.]

COLLIER, C. J.—It is enacted by a statute of this State, that in all appeals taken in virtue thereof, from a justice of the peace, when it shall be made to appear to the court, that the appeal was taken merely for delay, the court shall award fifteen per cent. damages. [Clay's Dig. 315, § 13.] After the appeal in the case before us was taken, the authority of the justice to receive the money he had adjudged to the plaintiff ceased, and the plaintiff himself could not have been compelled to accept it, unless he was also paid all costs that had accrued, as well as the damages which the court is directed to award, where the object of the appellant is delay. Yet if the judgment is satisfied, the appellee will not be allowed to proceed in the higher court merely for the purpose of recovering these damages, although he receives the money with a protestation that he will not yield them up, and insists upon the right to recover them. The damages are merely consequential, if allowed, they are to be calculated upon the amount of the judgment which the appellate court may render, and if the indebtedness is discharged by the reception by the creditor of his demand, then there is nothing upon which to rest a judgment for damages.

If the appeal had been returned to the circuit court and the money afterwards paid to the plaintiff, he would have been entitled to recover his costs up to that time, with the costs of a judgment disposing of the case. But such is not the situation of the present case. Here the money was paid by the defendant, and received by the plaintiff, while the papers were in the possession of the justice; and up to this time he was entitled to recover all costs. But the acceptance of the money, we have seen, satisfied his demand; notwithstanding which he directed the appeal to be returned, and attempted to prosecute his suit. His claim was extinguished before the case found its way to the circuit court—no judgment could there have been had by him—consequently he is not entitled to the costs of the circuit court.

True, in a proper case, it is a matter of discretion with the court, to which an appeal from the justice of the peace is taken, whether the statute damages will be awarded; but if they are adjudged in a case in which they are not recoverable, it is a fatal error. The consequence of what we have

said, is, that the circuit court misapprehended the law—its judgment is therefore reversed, and the cause remanded, if desired.

CONN LLY'S ADM'R, ET AL. V. KAVANAUGH.

1. When a *feme covert* prays that her portion of an intestate's estate may be settled to her sole use, and the answer sets up that the intestate became the surety for her and another person as the administrators of the estate of her first husband, of which estate assets to a large amount came to the hands of the administrators, and that the co-administrator as well as the complainant's husband are insolvent, indemnity against the liability will not be decreed when the answer is not sustained by proof of the insolvency of the administrator.

Writ of Error to the Court of Chancery for the thirty-second District.

THE bill in this cause is filed by Catherine Kavanaugh, by her next friend, against the administrators of John Connally, deceased, and its object is, to have her portion, as one of the distributees of the estate, settled to her sole and separate use, and protected against the apparent right of her husband, who with the other distributees of the estate, are made parties defendant to the bill.

The answer of the administrators shows no cause against the distribution of the estate, but sets up against the right of the complainant, that their intestate became one of the sureties for her and another person, as administrators of the estate of one Lewis, her former husband, in the year 1832, in the sum of \$20,000. The answer alleges, this administration has never been settled—that assets to the amount of more than \$18,000 came to the hands of the administrators—that

Carter B. Kavanaugh afterwards intermarried with the complainant, and thereby became joint administrator of Lewis, in her right—that the other administrator, as well as Kavanaugh and the co-surety, are entirely insolvent. From these circumstances, the defendants assert their belief that the debts due to the estate of Lewis, by his administrators, will ultimately involve the estate of Connally in heavy pecuniary responsibilities and losses, and having no other means to indemnify the estate, they submit, if the prayer of the bill shall be granted before the final settlement of Lewis' estate by his administrators, and until the estate of Connally shall be protected and saved harmless on account of said administrator,

The only proof in support of the answer is, exhibits of the administration bond—of the inventory and account of sales which charge the administrators of Lewis' estate with something over \$13,000—and several citations for final settlement of that estate.

The chancellor considered there was nothing in the answers, or proofs, to authorize the withholding the relief prayed, decreed a settlement on the wife of her portion of Connally's estate, and enjoined the administrators from paying it to any one other than her next friend.

This decree is now assigned as error.

C. C. CLAY, for the plaintiff in error, insisted—

1. That the complainant asking the aid of a court to protect her, will be compelled to render to the estate of Connally the same equity she seeks against her husband. Courts of equity uniformly act on this principle. [1 Story's Eq. 77, § 59; 1 Fonbl. 25, 43; 4 Bro. Ch. 436; Marks v. Morris, 4 H. & M. 463; Francis' Maxims, 2; 1 Fonbl. 127, 140.]

2. When equity has taken jurisdiction of a cause, it will retain it until ample justice is done between the parties. Here justice cannot be done unless the representatives of Connally can enforce their case as an equitable set off, [Lindsay v. Jackson, 2 Paige, 581,] and the insolvency is a sufficient ground to interpose, although the debt is not due. [Ib.]

S. PARSONS, for the defendant in error, contended—

1. That the cause was ready for hearing, and the chancellor was not required to continue it, so that the defendants could make other proof.

2. But it is evident from the late statute on this subject, that the matter urged below belongs to the jurisdiction of the orphans' Court. It is not the intention of the act, that the chancellor shall ascertain either the amount of the distributive share, or what discounts it was subject to.

GOLDTHWAITE, J.—The defendants resisted the apparent equity of the complainant, on the ground that their intestate, with another person, in 1832, became bound as sureties for her and George Connally for the administration of the estate of her former husband—that they and Connally have received assets of that estate to a large amount—that it remains entirely unsettled with the proper court—and that her present husband, as well as Connally, the co-administrator, and the co-surety, are wholly insolvent. From these facts the defendants insist an equity arises, for them to require, either that that estate shall be settled, or indemnity given before the complainant's portion of the estate the defendants represent, shall be settled on her. We are not prepared to say, this position would be untenable if the answer was sustained by proofs; but in the condition in which the record is presented, the expression of any opinion is improper, for the reason that the case is not sustained by evidence. If we concede that the insolvency of the administrators upon Lewis' estate, is a fact which authorizes the present defendants to demand indemnity, for the liability of their intestate on the administration bond, before payment of the complainant's portion, then it will be apparent the cause rests on this fact of insolvency. In the decision of the *Tuscumbia Rail Road Company v. Sherrod*, 8 Ala. Rep. 206, we had occasion to review all the cases bearing on the question, how far insolvency would confer jurisdiction on a court of equity, when without this fact it had none; but none of them go so far as to let in the jurisdiction on this account, when there would not otherwise be a failure of justice.

In this cause, the insolvency of one of the administrators is

conceded by the bill, as well as asserted by the answer, but as to the other, there is a total absence of proof. If George Connally, the co-administrator of the estate of Lewis is solvent, it is clear the defendants representing his surety, cannot be prejudiced by the insolvency of the complainant's husband as the same decree which established the indebtedness of the administrators of Lewis' estate would award execution against the solvent administrator, before any recourse could be had against the defendants representing the surety.

The case failing in this particular, it is unnecessary to examine it farther, as we could render no aid to the party, even if our judgment was, that the answer made out a full defence, or presented such a state of facts as would require a modification of the decree.

Decree affirmed.

McLANE v. SPENCE, ADM'R.

1. One who is administrator of two estates, may elect to which of the two certain property belongs. But the act manifesting such election, must be definite, clear, and certain, and not ambiguous or doubtful, to estop him from afterwards asserting title.
2. A decree in chancery, though in form final, which is in its nature interlocutory merely, cannot be pleaded in bar of another action.

Error to the Circuit Court of Talladega.

TRESPASS *vi et armis* by the defendant, against the plaintiff in error, for forcibly taking six slaves out of his possession; viz., Mike, Candice, Leah, Adeline, Harriet and Margaret.

The declaration charges, the forcible taking of the slaves

from the possession of one Miller, to whom they had been hired as the property of the estate of John C. Calhoun, of which the plaintiff was administrator.

The defendant pleaded—1. Not guilty. 2. That as coroner of Talladega county, he seized and sold the slaves, by virtue of two writs of *feri facias*, which issued on judgments obtained against the plaintiff as administrator of one William King, deceased, and alledges, that the slaves were the property of the plaintiff, as the administrator of W. King. 3. He craved oyer of the letters of administration of the plaintiff, which being read, he says *actio non*, because he says the plaintiff is not, and never hath been administrator of the said John C. Calhoun, deceased, in manner and form as he hath alledged, and this he is ready to verify, &c. 4. At the trial term, the defendant pleaded *puis darrein continuance*, the record and decree, made in a suit in chancery instituted in the chancery court of Talladega by David A. Calhoun, against the defendant and others, to recover these slaves, as the heir of his father, David Calhoun, and as the heir of his brother, John C. Calhoun, and that by the decree of the court, an account was ordered, and a decree rendered in favor of the complainants, against the purchasers of these slaves, at the sale made by the defendant as coroner, for such portion thereof as might be ascertained by the master's account, and for which an execution was ordered to issue when so ascertained. This is a brief abstract of the plea, which sets out at length, all the proceedings, and the decree made in the said suit in chancery, entitled David A. Calhoun v. McCartney and others. See this case reported at length, *supra*.

To this plea the plaintiff demurred, and his demurrer was sustained by the court.

A bill of exceptions taken at the trial of the cause discloses, that William King died, having made his will, and appointed his wife Matilda, and John C. Calhoun, executrix and executor, of his last will. That the will was proved and recorded in the orphans' court of Talladega. That the executors gave bond with good security, and took upon themselves the execution of the will. That they returned an inventory of the goods and chattels of King's estate, embracing the slaves in

the declaration mentioned. That in December, 1840, a sale of the personal property of the estate was made by the executors, pursuant to notice duly given. That the sale was numerously attended by persons able to purchase, the plaintiff among the number. That J. C. Calhoun directed twelve of the slaves to be put up in one lot, (including those here in controversy,) and purchased them himself at the price of \$5,050.

That on the day of, Calhoun died, and the executrix was removed, at the instance of the sureties. That on the same day, one Griffin, sheriff, was appointed administrator *de bonis non* of King, and also administrator of Calhoun. That the plaintiff, as the successor of Griffin in the sheriffalty, succeeded to his administration on that estate on the 17th March, 1842. That whilst Griffin had control of the slaves, he advertised them for hire as the property of Calhoun's estate, but being sick, employed an agent to attend to the hiring, who by mistake took the notes for the hire of the slaves, payable to Griffin as the administrator of King, instead of Calhoun. The slaves were in the possession of the persons hiring them, when they were levied on by the defendant in September, 1842, and sold by him as coroner.

The defendant proved that at the sale made by Calhoun, of King's estate, he was desired by one wishing to purchase, to put the slaves up separately for sale, and offered to bid \$800 for one Isaac, but Calhoun refused, alledging that he wished to keep the family together, and wished to buy them himself, and in the opinion of the witness the slaves, or some of them, would have sold better if they had been sold separately. The defendant also produced the executions upon which he made the levy and sale, which issued upon judgments rendered in favor of one McCartney, against the plaintiff as the administrator of King. That the plaintiff being sheriff, the executions issued to him as coroner, which he levied on the slaves in September, 1842, and sold them in October or November, 1842, and credited the proceeds of the sale on the executions, and that the slaves sold for a fair price.

He further proved that when Calhoun executed his bond as executor, he lacked two months of being twenty-one years old. He proved by the clerk of the orphans' court, that in

January, 1841, Calhoun brought to the office what he called a sale bill of the estate of King, which he refused to receive because it was illegible, and badly made out, and he never returned any other, but died soon afterwards. That the account of the sale of King's estate, in which the slaves are returned as having been purchased by J. C. Calhoun, was returned to the office by the executrix, after her removal from office as executrix.

He also offered in evidence, the transcripts of the records of the orphans' court of Talladega, in the matter of the administration of the estates of King and J. C. Calhoun.

In the report of Spence to the judge of the orphans' court, praying that the estate of King may be declared insolvent, among the debts due by the estate enumerated by him, is the following item:

" To balance judgment in favor of C. K. Mc-	
Cartney,	\$229 33
To amount of notes received for hire of negroes,	
which had been sold before the time expired	
for which they were hired	442 48
He also puts down as an item of debt:	
To amount against estate of J. C. Calhoun, dec.	8,442 16
Gross amount of debit items	\$15,640 61

Then follow the credits:

Sundries Dr. to Wm. King, dec'd.

J. C. Calhoun, to amount bought at administra-	
tor's sale	\$8,442 16
Amount of notes received of D. A. Griffin, ad-	
ministrator	2,421 43
	<hr/>
	\$10,853 59

This was received by the orphans' court as a report of insolvency.

The record of the administration of Spence, upon J. C. Calhoun's estate, shows, that on the 4th June, 1842, he reported an inventory of the notes, receipts, &c., handed over to him by D. A. Griffin, his predecessor, as belonging to the estate of J. C. Calhoun, amounting to \$2,771 68. On the 18th July, 1842, he obtained an order for the sale of some corn and cotton of his intestate, which he returned afterwards

as having sold for \$45 82. On the same day that this order was made, the following entry appears: "This day came Solomon Spence, as sheriff, and administrator of the estate of John C. Calhoun, deceased, and exhibited a statement of the indebtedness of said decedent to the estate of Wm. King, and other creditors, together with the amount probable, and certain, of the assets in his said administrator's hands of said Calhoun's estate, and the debts of the deceased, exceeding the assets. It is ordered by the court, that the report of insolvency made by the said Spence of his intestate's estate be received, and that the estate of the said John C. Calhoun is hereby declared to be insolvent, and that the same be administered, and finally settled as an insolvent estate." The "statement" here said to be exhibited, is not found in the record.

The defendant also offered in evidence the record of a recovery in chancery, by one David A. Calhoun v. McCartney and others, it being the same recited in the *plea puis darrein continuance*, and which is agreed to be considered as set out in full, to the introduction of which the plaintiff's counsel objected, and excluded the record, to which the plaintiff excepted.

And this being all the proof in the cause, the defendant's counsel asked the court to charge the jury, that if they believed the proof, they should find for the defendant, which charge the court refused to give, and to which the defendant excepted.

The jury found for the plaintiff, and assessed his damages at \$2,886 87, for which judgment was rendered.

Errors assigned—

1. In sustaining the demurrer to the *plea puis darrein continuance*.
2. In the matters set forth in the bill of exceptions.

W. P. CHILTON and BOWDEN, for plaintiff in error.

1. The fact that Calhoun sold the slaves (twelve in number) in one lot, when by putting them up in the usual way they would have brought more, coupled with his failure to pay for them, and his entire insolvency, and the further fact that he returned no inventory of his sales, authorized Spence,

who succeeds him, to treat his sale as a nullity and hold the property as King's. [McLane v. Spence, 6 Ala. Rep. 894; Draughan v. French's adm'r, 4 Por. 352.]

2. Spence adopts the sale made of the slaves by the coroner under McCartney's execution, by returning in his report of the insolvency of the estate, the balance of McCartney's debt, credited with the proceeds of said slaves. [See case first above.]

3. In Spence's report of insolvency, he elects to disaffirm Calhoun's purchase, and transfers the notes given for the hire of the slaves to King's estate, and squares the account with Calhoun's estate by charging him with the amount of sales to himself, but crediting him with the same amount.

4. It is the duty of Spence so to manage the estate as to incur the least expense. Justice to the creditors of an insolvent estate forbids that he should charge double commissions, &c. by administering on the property as Calhoun's and then transferring the proceeds, minus the fees, commissions, &c. to King's estate, he thus obtains double commissions. He elected not to proceed thus, and every consideration of public policy sustains his election.

5. The plea *puis darrein continuance* should have been held good. As by the record exhibited by the plea, in a controversy to which the plaintiff and defendant in this suit were parties, a court of competent jurisdiction determines the right of property to be in a third person. [2 Phil. Ev. C. & H. Notes, 822.]

6. But it should have been left to the jury to decide whether the slaves were worth more than the amount decreed to be a charge upon them in chancery. This averment we are to presume the plea contained, and it is warranted by the decree.

7. But the record in the cause of Daniel A. Calhoun v. Spence, McLane, McCartney, et al. was competent proof to be submitted to the jury, because—1. In a judicial proceeding which estops the parties to this suit, the chancellor decides the property is of the estate of David Calhoun, late of Georgia. 2. The sale by the coroner, McLane, is confirmed, and while McCartney, the purchaser, keeps the slaves, he is

charged with the share decreed the complainant. 3. It shows at least a decree for one-third of the property to David Calhoun; which one-third, Spence as administrator of John C. Calhoun, had no right to recover; and to this extent at least, the evidence is good in mitigation of damages. [See cases below.] 4. The record showed in the answer of Spence (his sworn admission) that he was endeavoring to make King's property pay his debts, and that while sheriff, he had levied upon Isaac and Greene, two of the slaves bought in by Calhoun, to satisfy a *fi. fa.* of Baker, Sprouls & Co. v. King's estate, as he well might do. [Bull. N. P. 46; Watts v. Philips, *Ib.* 49; Muntford v. Gibson, 4 East, 441; Fisher v. Prince, 3 Burr. 1363; Earl v. Holderness, 4 Bing. 462.]

8. In trover, damages are not given for the taking—the *tort* is waived, but the act of converting property to which the plaintiff has the right is the *maleficium*, which entitles the party to damages. [Cooper, et al. v. Chitty, et al. 1 Bur. 31.] Satisfaction for the conversion to the rightful owner, is a satisfaction to one who claims a mere special property.

The measure of damages is the value of the property converted, and interest. [Wilson v. Conine, 2 John. R. 280; 2 Cain's Ca. in Er. 200.] But clearly, if the plaintiff only owned two-thirds of the interest in the property, he could (if he can recover at all) only recover to the extent of his interest.

He must have the right to the chattel. [Debow v. Titus, 5 Halst. 128.]

And as one-third, at least, had been decreed to David Calhoun as his distributive share of his father's estate, Spence should not recover for this, and thus McCartney be compelled to make double satisfaction.

But as the case now stands, it is hard to estimate his loss.

1. He is to pay Calhoun the decree, amounting, as we may reasonably suppose, to more than the value of the property.
2. He loses his debt against King's estate, which Spence has credited with the sale of the slaves; and then—
3. He is to refund to Spence the value and interest, having indemnified

ORMOND, J.—The slaves in controversy, were sold by the plaintiff in error as coroner, by virtue of an execution against the representatives of the estate of William King, and the question is, whether they belonged to that estate, or to the estate of J. C. Calhoun, as the property of which they are now claimed.

Previous to Spence, the defendant in error, becoming the administrator of King, Calhoun, as King's executor, and by virtue of power derived from the will, had exposed the slaves in controversy with others for sale, and had purchased them himself; but under such circumstances as would have enabled the legatees or creditors of King to set aside the sale on application to a court of chancery. Subsequently Calhoun died, and Spence, in virtue of his office as sheriff, succeeded his predecessor, Griffin, in the administration both of the estates of King and Calhoun.

When this case, or one involving the same points, and between the same parties, was here at a previous term, (McLane v. Spence, 6 Ala. 898) we held, that as the purchase by Calhoun was voidable at the election of those interested in King's estate, Spence, as the administrator of both estates, might elect to consider the purchase by Calhoun as set aside, as he could not sue himself, and might do that voluntarily which a court of equity would have compelled him to do; but until the sale was set aside by a competent court, or by the election of the administrator of both estates, the title passed to Calhoun by his purchase. The sale has never been set aside by a court of chancery, and the motion for instructions upon the whole evidence, presents the question, whether Spence has himself elected to consider the slaves as the property of King's estate.

The remarks made in *McLane v. Spence*, *supra*, were predicated upon the facts as they were set out in the bill of exceptions. We have now before us the record of the entire proceedings of the orphans' court upon both the estates of King and Calhoun, and in our opinion it does not justify the inference, that Spence elected to consider the slaves the property of King's estate. The facts relied upon are, that Spence, in rendering an inventory of the estate of Calhoun, did not return these slaves as belonging to that estate. This

fact is of a negative character, and would not be of much avail, unless he had reported them as belonging to the estate of King, in his inventory of that estate, which he did not do. The omission may be accounted for by the fact, that he never had actual possession of the slaves, they having been hired out by his predecessor before his appointment, and sold by the plaintiff in error before the expiration of the term of hiring. We think, therefore, the mere fact, that he did not return them in his inventory as the property of Calhoun's estate, does not establish the fact contended for. Nor is it of any weight, that the notes taken for the hire of these slaves, during the year they were hired out as above stated, were made payable to the administrator of King. The hiring took place under the administration of Griffin, the predecessor of Spence, by virtue of an order of the court directing him to hire them out, as the property of Calhoun, and it is shown that the notes were made payable to the administrator of King by the mistake of Griffin's agent, he being unable to attend the sale. But independent of this, no conclusion could be drawn against Spence from this act, as he was neither a party, or privy to it.

The fact principally relied on is, that in making an estimate of the assets of King's estate, preparatory to an order declaring the estate insolvent, he puts down among the debts due by the estate, \$229 31, the balance due on McCartney's judgment. This sum is the balance due upon that judgment, after crediting it by the amount of the sale of the slaves now in controversy, made by the plaintiff in error. The argument, and indeed it may be said the said the just inference from this fact unexplained, would seem to be, that it was an admission that the slaves were rightfully sold as the property of King; but this inference is shown to be unjust, when the accompanying facts are considered.

The report for the insolvency of King's estate was made on the 8th November, 1842, after the execution of McCartney v. King's administrator had been returned satisfied, except for the sum of \$229 31, and we cannot think it was the duty of the administrator of King, to assert that a larger sum was due than the plaintiff himself claimed. It is true, the money was made by a sale of these slaves as the property of King's es-

tate, but the sale was forbidden by Spence, and the slaves claimed by him as the property of Calhoun's estate, and eight days before this report of the insolvency of King's estate, this suit was brought to recover the value of the slaves as the property of the estate of Calhoun. These facts, in our opinion, explain the character of the item relied on as an admission. It is evidently nothing more than a statement of what McCartney claimed to be due on his judgment. He also in the same report, puts down as an item of debit, \$8,442 16, the amount of the purchases of Calhoun of the estate of King. This is clearly a mistake, as it should have been put down among the assets, and is accordingly so put down; but the consequence of thus neutralizing the two items is, that the estate, which from the showing made, appears to have an excess of assets of \$3,665 14 beyond the claims against it, is declared insolvent. There may have been other matters brought to the notice of the orphans' court, and which influenced its judgment in declaring the estate insolvent, but the report of the administrator is so loose, incoherent and unsatisfactory, that no inference of any kind can be deduced from it, without great danger of mistake. Certainly, when considered in connection with the other facts which have been stated, it is entitled to no weight whatever, as an admission of the fact attempted to be deduced from it. •

Some reliance is also placed upon an admission in the answer of Spence, to a bill in chancery filed by David A. Calhoun against Spence and others, claiming these and other slaves, as his property, as the heir of his father, of whom King was the administrator. The record of the chancery cause was rejected by the court below, but if we could look to it for this purpose, it would not avail the defendant in error. The admission made by Spence, is of two slaves, not involved in this suit; which he had levied on and sold as sheriff, before he was administrator either of King or Calhoun. But in addition to this, the entire record, and decree were offered in evidence, and from other answers of Spence, made after he was appointed administrator of these estates, he claims these slaves as belonging to the estate of Calhoun. This motion for a charge upon the entire testimony of the cause, is in the nature of a demurrer to the evidence, and in

our opinion it establishes, that Spence, since he has been the administrator of these estates, has always claimed to hold these slaves as the property of the estate of Calhoun.

The plaintiff, at the trial of the cause, pleaded *puis darrein continuance*, the record of a suit in chancery instituted by one David A. Calhoun, against Spence, the present defendant, McCartney and others, the purpose of which was to subject the slaves in controversy, and others, to the payment of his distributive share of his father's estate, in the hands of King, its administrator, and claiming those slaves as the property of his father's estate. See this case reported *supra*.

The chancellor decreed that these slaves were a fund, out of which the complainant was to be paid his distributive share, and that they were liable in the hands of McCartney, and others as purchasers with notice of his equity. He further made a reference to the master to ascertain what was due to the complainant as distributee, crediting King's estate with the proper compensation for the board, education and clothing of the complainant. He also directed an account to be taken of the value of the slaves held by the different defendants, with the value of the hire, and when the sum due the complainant was ascertained, he further directed the master to apportion it among the different defendants, according to the value of the slaves held by them, purchased as aforesaid, and if they did not pay the sum so ascertained to be due within thirty days after notice, an execution was to issue against them, and each of them, for the amount so withheld, &c. To this plea the court sustained a demurrer.

Waiving all other objections to this plea, it is sufficient to say, that it presented no fact, by which the jury could ascertain, either the right of the defendant to a verdict, or the damages, if any, to which the plaintiff was entitled. Conceding that the defendant could in this action avail himself of any defence which the purchasers at the execution sale could make, and supposing further, that a liability to pay, was equivalent to a payment in fact, yet the decree does not ascertain what sum, if any, the purchasers of the slaves are liable to pay. The only fact definitely ascertained by the decree, is, that the complainant has a *lien* upon these slaves in the hands of the purchasers, for an aliquot portion of the

sum which, upon taking the account, may be found to be due from King, the administrator, to the complainant. What that sum is, or what the share or proportion of each will be, or whether any thing is due, is wholly uncertain. Indeed the decree, though in form final, is in its nature essentially interlocutory merely, and the demurrer to the plea was properly sustained. See the case of McCartney, et al. v. Calhoun, *supra*.

These remarks apply fully to the motion made to offer the decree in evidence, in mitigation of damages.

Judgment affirmed.

RIGGS, ET AL. V. THE BANK OF THE STATE.

1. In a summary proceeding by the bank against its debtor, the notice alleged that the drawer and indorser were indebted to the plaintiff by a bill of exchange, purchased under the first section of the act of 1843, and informed them that a motion would be made against them for the amount of money due and unpaid on the bill, together with the interest and damages at the rate of *thirty per cent.* which shall have lawfully accrued thereon. The damages prescribed by the statute on one description of bill to which it referred was thirty, and on another five per cent. *Held*, that as the plaintiff upon proof of default and notice might recover at least five per cent. damages, the notice was not bad on demurrer.
2. In a proceeding by notice and motion, at the suit of a bank against its debtor, if no issue is made up, and a verdict returned for the plaintiff, it is not necessary that the judgment should affirm, with particularity, the proof of every fact which was necessary to have authorized their verdict; it is enough if it distinctly sets forth the facts, which are essential to the exercise of the summary jurisdiction.
3. Where the jury render a verdict for more damages than the legal liability on which the plaintiff founds a right to recover, the judgment will not be reversed on error, but a defendant should move for the new trial in the primary court.

Writ of Error to the Circuit Court of Tuscaloosa.

THIS was a suit instituted by notice and motion under the act incorporating the bank to recover the amount of a bill of exchange for \$5,000, with damages and interest. The notice describes the bill as drawn by Daniel M. Riggs on the 1st June, 1844, addressed to the same name, at Mobile, requesting the drawee on the first day of May next, thereafter, to pay to the order of Hardin Perkins, in specie, the sum of \$5,000, at the Bank of Louisiana, New Orleans, which bill was indorsed by the payee to Thomas D. King, and by the latter to the defendant in error. The notice alleged that the drawer and indorser were indebted to the plaintiff below by a bill of exchange, purchased under the first section of the act of 14th February, 1843, and informs them that a motion would be made against them, "for the amount of money due and unpaid in said bill, together with the interest and damages, at the rate of thirty per cent. which shall have lawfully accrued thereon." The defendants demurred to the notice, and their demurrer being overruled, an issue was made up and the cause submitted to a jury at the term of the circuit court holden in March, 1846, who found the issue in favor of the plaintiff, and assessed the damages at the sum of \$6,627 31 and judgment was rendered accordingly.

E. W. PECK, with whom was B. W. HUNTINGTON, for the plaintiff in error, contended that the allegation in the notice, that the bill had been purchased by the bank, under the provisions of the first section of the act of 1843, was not sufficient to entitle the plaintiff to recover *thirty per cent. damages*, whatever might be the truth of the case. Under that section it was competent for the bank to purchase, not only bills upon which on a protest for non-payment, such damages might be recovered, but to purchase others on which the damages would be but five per cent. To authorize the plaintiff to recover the higher rate of damages, the notice should have stated the purpose for which the bill was purchased. [Leigh v. The State Bank, 10 Ala. R. 339.]

The statement in the notice that the plaintiff would claim thirty per cent. damages, does not cure the defect—it is not

a traversable allegation. It cannot be inferred from the fact that the bill was payable in *specie*, that it was bought for the purpose of remitting funds to pay the State bonds. There being no allegation adapted to the admission of the proof, it must be intended that the plaintiff recovered *thirty per cent. damages*, in the absence of such evidence.

PORTER, for the defendant in error, made the following points: 1. There was no defect in the notice authorizing the court to sustain a demurrer to it. It conforms to all the requirements in regard to such process. [Sale v. Decatur Bank, 1 Ala. Rep. 425; Crawford v. Bank of Mobile, 7 Ala. R. 205; Colgin v. The State Bank, at this term.] 2. So far as the question of interest is concerned, it was not necessary to state in the notice, that it would be demanded. The law fixes the rate of interest, and the court will *ex officio* notice it. 3. Notice in these cases have not the effect of process, nor is a suit pending till the motion is submitted. [Beard v. The Bank, 8 Ala. R. 344; Lyon v. The Bank, 1 Stew. 442; Bondurant v. Wood, 1 Ala. R. 543; Griffin v. The Bank, 6 Ala. R. 911.] 4. As to the question of usury, there must be a design to evade law. [Chitty on Con. 541; Bank v. Waggoner, 9 Pet. 378.] 5. The usury must be determined upon at the time of the transaction, subsequent results will not make it so. [Tate v. Willings, 3 T. Rep. 539; 1 Saund. 295, n. 1; 1 East. R. 92; Phillips v. Cochrane, 3 Camp. R. 119; 8 Mass. R. 101, 256; 1 Pet. R. 43.]

COLLIER, C. J.—In Leigh v. The State Bank, at the last term, it was held, that to authorize a recovery of *thirty per cent. damages* upon a dishonored bill, purchased under the first section of the act of 1843, it must be shown upon the record, that the bill is included in the class upon which such damages are given. The judgment in that case was by default, and this court remarked that it had been settled by many previous adjudications, “that every fact must be shown upon the record to have been proved, which was necessary to establish the liability of the defendant to the judgment as rendered.”

It does not appear from the notice, that the bill upon which the motion was made, was purchased pursuant to the provisions of the statute referred to, which entitle the bank to *thirty per cent. damages*, upon its being dishonored for non-acceptance, or non-payment; unless the statement that a judgment would be moved for, to recover that amount, can be considered as equivalent to such an averment. However this may be, we will not stop to inquire. The notice described the bill correctly, and is certainly sufficient upon due proof, to authorize the plaintiff to recover at least the amount of the bill, with *five per cent. damages*, and interest—this being the lowest rate of damages prescribed by the act, which are recoverable upon a dishonored bill. It follows then, that as the plaintiff might have obtained a judgment upon his bill, though for less damages than he claimed, the demurrer to the notice was rightly overruled.

In *Smith, et al. v. The Branch Bank at Mobile*, 5 Ala. Rep. 26, it is said, the result of all the cases in this court, where judgments had been rendered on motion, is, that when the judgment is by default, it must appear by the judgment, that the defendant had the notice which the law requires, and that the facts were proved which gives the court jurisdiction, and show the liability of the defendant for the debt, or penalty. If the defendant appear, it will be evidence of notice, and if an issue is made up and submitted to a jury, it is then like any other cause, commenced in the ordinary mode, except that it must appear upon the record, that the court had jurisdiction to entertain the motion. [See *Curry v. The Bank of Mobile*, 8 Porter's Rep. 360.] Here the judgment entry directly sets forth the facts which are essential to the exercise of the summary jurisdiction.

If the damages assessed are more than the plaintiff was entitled to recover, the defendants should have moved a new trial in the circuit court, and cannot alledge on error, that the verdict and judgment are for a sum greater than the legal liability sought to be enforced, and that the liability will not support the recovery. When a judgment by default is rendered for more damages upon a dishonored bill, or more interest upon a note or other writing than the law allows, it might be corrected on motion in the primary court, or here,

at the cost of the plaintiff in error. But it was decided by our predecessors, that where the damages or interest were assessed by a jury in such cases, the defendants' remedy was by motion for a new trial, and a judgment rendered on such a verdict, would not be reversed on error. To this decision we have repeatedly done homage, and are still inclined to follow it—it is decisive of the case at bar, and the judgment of the circuit court is therefore affirmed.

CLOPTON v. MARTIN.

1. When by mistake a written agreement expresses more or less than the parties intended, a court of equity will reform it, but the proof of the mistake must be full and satisfactory.
2. When in the sale of a slave it was agreed the purchaser should have no warranty of soundness, and he was informed the slave had been some years before afflicted with fits, but no bill of sale was then executed—the parties agreeing that it should be so on a certain day when the price was to be paid—and the seller afterwards caused a receipt to be drawn expressing a warranty of the then soundness of the slave under the impression this would not bind him if the slave should afterwards be afflicted in a similar manner: *Held*, that a case of mistake was made out sufficient to warrant the cancellation of this clause of warranty.

Writ of Error to the Court of Chancery for the thirty-second district.

MARTIN is the complainant in this bill, and by it he alleges that on the 17th December, 1841, he sold and delivered to the defendant, Clopton, a certain slave, for the price of \$700. That the sale and delivery was made without any warranty as to the health and soundness of the slave, and so accepted by the purchaser. Some years previous to the sale, the slave had been afflicted with spasms or fits. Of this the complain-

ant fully informed Clopton before the sale. In the conversations previous to the sale, the complainant asked \$800 as his price, but for the reason that the slave had been so afflicted, although the complainant did not believe they would again recur, and because he did not intend to warrant his health, he agreed to take \$700. The slave was then delivered to the purchaser, and has ever since remained in his possession.

After the sale (on the 20th of December of the same year) the purchaser applied to the complainant for a bill of sale of the slave, and he executed a receipt for the price paid, in which, after a warranty of the title, is found this clause: "And said negro man I warrant to be sound at this time."

The complainant procured a friend to draw this instrument, but his instructions were to make the written engagement conformable to the actual terms of sale, and it was not the intention to bind him in any manner on account of the previous affliction of the slave. The warranty contained in the writing was inserted therein by the ignorance and mistake of the complainant as to its effect, and is that much more than was contracted for by the purchaser.

The bill then states that Clopton is proceeding by suit on this warranty against the complainant, and as he is advised, will be able to prove that the slave after the purchase was afflicted in a similar manner with fits to what he was some years previous to the sale. The prayer is, that the bill of sale may be delivered up or otherwise disposed of as the court might direct, and Clopton be enjoined from proceeding in the suit commenced, or in any other suit on the warranty of soundness.

The defendant answered the bill, denying all its allegations in terms, but admits the complainant did inform him the slave had some five years before had fits when a small boy, but sold him as a sound slave. He denies the contract was complete until the delivery of the bill of sale; though the delivery was made previous to that time, yet the money was not to be paid until a few days afterwards, when the slave was to be conveyed. He also insists the warranty contained in the bill of sale is that agreed for by him.

The evidence in the cause may be thus condensed: Two of the sons of complainant assert they were present at the sale which took place on the 17th December, 1841. The

price agreed on was \$700, and the defendant was then informed the slave had been afflicted with fits, but had had none for some two or three years. The complainant was to give no warranty of soundness, and if the defendant took him at all, he must risk his soundness. The agreement was, that the defendant was to pay for the slave the next Monday after the sale, when a bill of sale was to be given. The complainant objected to delivery at that time, wishing to defer it until the money was paid, but at the instance of the defendant, acquiesced in his taking the slave.

A witness not connected with the parties speaks of conversations with the defendant, in which he spoke of his knowledge that the slave had previous to the purchase had fits, and his assertion that he would not have purchased but for the impression the slave had outgrown them.

A physician was examined to prove his attendance on the slave in 1839, when he was considered cured—the cause was supposed to be worms, or too rapid growth.

Several of the witnesses concur that the slave had not been afflicted since 1839, previous to the sale.

Another witness states the complainant called on him after the sale, and stated he wished a bill of sale drawn so as to express that if the slave should be afterwards afflicted with fits, the complainant was not to be bound. Under the impression that this intention would be expressed thus, witness drew the bill of sale, which the complainant afterwards, on the 20th December, delivered to the defendant.

The chancellor decreed a perpetual injunction of the suit at law, and directed the costs to be paid by the defendant.

This decree is assigned as error.

ROBINSON, for the plaintiff in error, insisted—

1. That the conversation between the parties, testified by the sons of the complainant, was previous to the contract of sale, and must be considered as merged in the bill of sale. [3 Cowan & Hill's Notes, 1466-7.]

2. But if the evidence can be looked to as showing the contract, then it is the attempt to show by *parol* an intention different from that evinced by the writing. [6 Vesey, 334, note c; 4 Dess. 215; Dufrene v. McDonald, Ibid, 209;

Dwight v. Pomroy, 17 Mass. 303; Wade v. Howard, 6 Pick. 492; Rich v. Jackson, 4 Bro. Ch. 514; Iddings v. Iddings, 7 S. & R. 111; Mann v. Mann, 1 John. Ch. 231.]

3. The testimony of the only reliable witness (he who speaks of drawing the bill of sale) shows that there was no such mistake as alledged, or if there was a mistake, it is of law and not of fact. [Lyon v. Richmond, 2 John. Ch. 51.]

4. The proof of a mistake must be clear and satisfactory. [Gray v. Ward, 4 Blackf. 432; Harrington v. Harrington, 2 Howard, 720; Lyman v. United Ins. Co. 2 John. Ch. 630.]

SILAS PARSONS, contra, contended that the mistake was sufficiently made to appear, as the contract is proven to be different from that expressed in the bill of sale, and the reason is also given why that is in the form it is—a mistake of its legal effect by the person drawing it. [1 Story's Eq. § 162; Thompson v. Vaughan, 2 Atk. 31; Bishop v. Church, 2 Vesey, 100; Ibid, 371; Thomas v. Frazer, 3 Ibid, 399; 1 Story Eq. 121; Ib. 128; O'Neal v. Teague, 8 Ala. R. 345.]

GOLDTHWAITE, J.—The reformation of written agreements, when, by mistake, they express more or less than the parties intended, is now a well established branch of equity jurisdiction, but if the proofs are doubtful and unsatisfactory, and the mistake is not entirely plain, equity will withhold relief on the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy. [1 Story's Eq. § 152, and cases there cited.]

If, as the counsel for the defendant supposes, the proof in this cause established the contract to be, that the complainant was to warrant the then condition of the slave, it would admit of serious question, whether his mistaken impression that such a contract would not cover a constitutional defect subsequently developed, would be admitted to qualify the legal import of his agreement; but as we understand the evidence, no such inference is warranted. Those present when the sale was made, are positive and precise in declaring the contract was, the slave should not be warranted sound, and the reason was then given by the seller, why he would not

assume this obligation. The contract was then complete in all its terms, and nothing remained to be done by the purchaser than to pay the money, or by the seller, than to execute the bill of sale. If the proof had stopped at this point, it is possible there would be no sufficient explanation to account for the variance between the contract as agreed on, and that expressed by the receipt. There is no ground, however, to suppose the contract itself was afterwards varied by the parties, for the complainant himself caused the bill of sale to be prepared, and the testimony of the draftsmen is convincing that the warranty of soundness was inserted—not because there was any contract to that effect—but to guard the complainant against the precise difficulty which afterwards happened and which the bill of sale as drawn does not exclude. In our judgment, it is a case of mistake clearly within the rules previously stated, and the chancellor's decree is substantially correct, though it might properly have gone farther and decreed the cancellation of this clause of the warranty.

Decree affirmed.

GODBOLD v. THE BRANCH BANK AT MOBILE.

1. Directors of a bank are not responsible for an injury to the bank, caused by their act, originating in an error of judgment, unless the act be so grossly wrong as to warrant the imputation of fraud, or the want of the necessary knowledge for the performance of the duty assumed by them, on accepting the agency.
2. The giving compensation to a member of the board of directors, for *extra* services as an agent of the bank, though unlawful, is not such an act as will expose the directory to liability, if done in good faith, and with the honest intent of benefitting the bank.

Error to the Circuit Court of Baldwin.

ACTION on the case by the defendant against the plaintiff in error.

The declaration contains two counts—

1. After the formal part, "For that whereas, heretofore, to wit, &c. on, &c., the said plaintiff, was lawfully possessed of a large amount of funds, and effects, consisting of gold and silver coin, bank bills, &c., of great value, to wit, of the value of \$2,000,000, as, and for, the capital stock of said plaintiff, as a body corporate, duly created. And on the day and year aforesaid, the said defendant, with others, was duly elected, and employed, for a certain reasonable reward, as directors of the said Branch Bank, for the space of one year, then next ensuing, and the said defendant, together with the other persons thus elected, then and there accepted, and entered upon the said employment, and office of directors as aforesaid, and assumed upon themselves the duties thereto pertaining, and continued and acted as such, until the time of the committing the grievances hereinafter mentioned, to wit, at Mobile, in the county aforesaid; and thereupon it became, and was the duty of the defendant, with others, and respectively as such directors, to take, and use, all proper care and diligence in and about the preservation, custody, continued disbursement and safe keeping of the said funds, credits and effects of the said plaintiff, and to use, keep, and continue the same, in such manner only, as is expressly provided for, and set forth in its charter, and several statutes creating and regulating the said plaintiff, as such body corporate and politic. And by virtue of a certain statute of the State of Alabama, then in force, it was the duty of the said board of directors, or a majority of them, to pay out of the said funds, credits and effects, to each of the directors of the said Branch Bank, \$1,000 *per annum*, for their services as such directors, during the year 1842. Yet the said defendant, together with others, being a majority of said board of directors elected as aforesaid, jointly with the others, and severally, totally disregarding his said duty, and contriving, and fraudulently intending, to injure the said plaintiff, whilst he, the said defendant, jointly with the others, and severally was and acted as such directors aforesaid, and was with the others,

who then acted with him, a majority of the said board of directors, and had the care, custody and control of said funds, credits and effects, to wit, at Mobile, in the county of Baldwin, squandered, and illegally paid out, from said funds, to one William E. Starke, who at that time was one of the directors of said bank, and claimed and received his lawful *per diem* as aforesaid, the sum of \$500. By means of the premises, and by and through the careless, negligent, and improper conduct of the said defendant, as such director, as aforesaid, the said funds of the said plaintiff were greatly impaired, wasted, and dissipated, and the said \$500, a portion thereof, finally lost to the said plaintiff, to wit, &c.

2. And whereas, also, the said defendant, to wit, at Mobile in the county of Baldwin, was with the others, duly elected and employed for a reasonable reward, as directors of the plaintiff, as a body corporate and politic, and on the day and year aforesaid, assumed and took upon himself, jointly with the others, and respectively to perform the duties thereof, and thereupon became, and was bound to preserve, and take care of, and properly account for, the funds, credits and effects of the said plaintiff, of great value, to wit, of the value of \$2,000,000, and which, by virtue of his said office, and employment, were entrusted to his joint, and several care, and control; yet the said defendant, jointly with the others, and severally, totally disregarding his said duties, and obligations, and contriving, and fraudulently intending, to injure the plaintiff, while he, the said defendant, jointly with the others and severally was, and acted as such director as aforesaid, and contrived with those who acted with him, a majority of said board of directors, and had the care, custody and control of the said funds, and of the said plaintiff, to wit, on the day and year, &c. took so little and bad care in and about the preservation, safe-keeping, and proper disbursement of said funds, &c. of said plaintiff, that by and through the gross negligence, and illegal and improper conduct of the said defendant as such director, and as one of the majority of said board as aforesaid, paying out to one William E. Starke, the sum of \$500, to which he was not entitled, and said funds *quoad hoc*, were wasted, impaired, and finally lost to the plaintiff, to wit, &c.

The defendant demurred generally to the declaration, which was overruled by the court, and he pleaded not guilty.

Upon the trial, as appears from a bill of exceptions, the plaintiff proved, that the defendant was a director of the bank for the year 1842, and that during the same year Wm. E. Starke was also director, and received \$1000 as his compensation as such, as provided by the statute. That the defendant, as one of the directors, and voting with the majority of the board, employed the said Starke as the agent of the board, to visit the different counties in Alabama, and the State of Mississippi, to collect monies, and look after, and attend to the business of the bank, and that the defendant as a director during the year 1842, voted that the said Starke receive as a compensation for his said services, the sum of \$500, over and above his salary, which was paid to him by the cashier.

On the part of the defendant, it was proved, that the inducement which moved the board, and the defendant, to employ the said Starke, in preference to one not connected with the bank, was his capacity for transacting such business, and the superior obligation he would be under by his oath, to attend to the business faithfully. It was farther proved, that he was employed a considerable time, and that his services were valuable to the bank.

The court charged the jury, that if they believed the evidence, they ought to find for the plaintiff, and that the measure of damages was the amount so received by Starke.

The defendant moved the court to charge—

1. That unless the defendant, in the act complained of, intended to defraud the plaintiff, or benefit himself, they should find for the defendant.
2. That if the contract with Starke was made in good faith, and for the purpose of benefitting the bank, the plaintiff could not recover.
3. That the action cannot be maintained, if the defendant acted in his corporate official character, though the plaintiff was injured thereby.
4. That if the services of Starke were of value to the

plaintiff, equal to the sum of five hundred dollars, it could not recover. These were refused.

The assignments of error present all these questions.

A. F. HOPKINS, for plaintiff in error. The first count contains no cause of action against the defendant alone, because the act complained of, is shown by the declaration to have been done by a majority of the directors, of whom the defendant was but one. The cause of action therefore, if any there be, is against all who composed the majority. The charter conferred no power, and imposed no duty upon the defendant as an individual, but the powers and duties were conferred jointly. No individual director is responsible, unless the money went into his possession. [3 Wend. 130; 1 Ch. P. 79; 2 Johns. 365.]

If two or more persons participate in the commission of a *tort*, the injured person may sue one separately, or any number jointly, because each person is capable of willing the injury, and of doing or causing it to be done. The authority to employ the agent, was vested in the majority, which consists of the equal portion of power, which each member of the majority has. The act is not the result of the capacity of one director. The act cannot be divided into parts, and one part, and its consequences, assigned to one director. Whether the act be legal or illegal, it is clearly the act of the majority, they should therefore have been sued jointly.

The cause of action, if any, belonged to the State of Alabama, and not to the bank. This question was not considered in the *Bank v. Collins*, 7 Ala. Rep. 95, and therefore not concluded by it. Besides the cases are entirely dissimilar. That was for money of the bank improperly received by a director, this is for a malfeasance in office, and no power has ever been given to the directors to sue their predecessors in office for a breach of duty.

PHILLIPS, contra. Non-joinder of defendants in *tort*, can only be taken advantage of by plea in abatement. Misjoinder may be by demurrer. [1 Chitty P. 77.] One defendant in trespass, may be sued alone, and even if it appears from the declaration, or other pleading, that the *tort* was commit-

ted jointly by the defendant, and another person, no objection can be taken. [1 Chitty P. 78; 2 Johns. R. 365.]

The case cited from 3 Wend. 134, shows conclusively, that if any one or more of the directors improperly obtained, and disposed of funds, the property of the company, they are responsible as individuals, and not jointly as directors. The declaration in this case, is precisely similar to that in the case referred to.

A person is liable as a trespasser, though not benefitted, by the act. [1 B. & P. 369; 1 Camp. 187.]

The Bank, and not the State, is the proper party. The constitutionality of the Bank is supported on this ground. [3 Ala. R. 271.]

It is a matter of no moment that the act was beneficial to the Bank. It had already purchased the services of the agent as a director, and the act was unlawful.

ORMOND, J.—This action is against the defendant, as one of the majority of the board of directors of the Branch Bank of Mobile, by whose act a sum of money was appropriated to compensate another director, as an agent of the bank.

In the Branch Bank at Mobile v. Collins, 7 Ala. 95, this was held to be illegal, and that the money so unlawfully received could be recovered from the director receiving it, by action of assumpsit. This action is against an individual director, who by voting with the majority participated in the unlawful act, but did not receive the money.

The act incorporating this, as well as the rest of our banks, placed it under the control of a president and directory. The second section of the charter declared, that "for the management of the concerns of said bank, the legislature shall annually proceed to elect by joint vote of both houses, a president, and fourteen directors, whose office shall continue for one year," &c. The power here conferred on the directory, is to those composing it collectively, and not as individuals, and like all other grants of power to a body of men acting in a corporate, political, or judicial capacity, is to be exercised by the majority, unless the act creating the body otherwise limits, or declares the mode in which it shall act,

or manifest its determinations. The only limitation in the charter of this bank is, "that not less than six of the directors shall constitute a board for the transaction of business, of whom the president shall always be one;" and as it does not require that each member of the board shall concur in the performance of any act, it follows necessarily that the act may be done by a majority of the board present. This, however, is not left to inference, as the act requires the board to keep a minute of its proceedings, and authorizes any member to require the yeas and nays to be recorded.

That it is not the vote which any director may cast, which constitutes an act for which he might be afterwards held responsible, is evident from the fact, that it requires a majority to do any act as a board of directors, and that it is only as one of the majority, that a director can participate in the action of the board. He has no capacity to act as a director, but as an integral part of the board, and the act when done, is not the act of each member individually, but is the result of the joint action of the majority collectively. A vote given by a member in the minority, has clearly no influence upon the action of the board, yet until the result of the ballot or vote is ascertained, his voice is as potent, as one which the result ascertained to have been in the majority. It follows necessarily, that an act done by the board, is not the act of the individual members who by voting in the majority have produced the result, but the act is the consequence of the joint action of those directors, who by their vote have carried the proposed measure.

The case of the Franklin In. Co. v. Jenkins, 3 Wend. 130, is the converse of this. There, four persons were sued as directors, for a waste of the funds of the company, and the court held, that as they did not constitute a majority of the board, they were incapable of doing any corporate act, and could not therefore jointly, as directors, have wasted the money or effects of the corporation, but if liable at all, were liable individually. That is the precise principle involved in this case. In both counts of the declaration, the act complained of, is charged to have been done by the defendant in his capacity of director, acting with, and constituting one of the majority of the board, by which the act was done; it

was an act, therefore, which from its very nature, as well as from the express allegation of the declaration, was not an act done by him as an individual, but the act of the board. Doubtless each of the individuals, comprising the directory, by an improper interference with the property of the bank, would be responsible to it for the injury thereby sustained. But that is not the charge. He is charged not with his own act, but with the act of the majority of the board, and in my opinion, no action can be maintained against any individual composing that majority, but that if liable at all, they are jointly liable.

It is further urged, that conceding all the directors composing the majority should have been sued, advantage can only be taken of the omission by plea in abatement. The rule that although several are concerned in the commission of a *tort*, they may be sued either jointly or severally, proceeds from the nature of the act, which in general is such, that each, or all may have committed it. If it is of such a nature that it cannot be joint, as in verbal slander, although many may repeat the same words, the action must be several, (1 Ch. P. 77); and for the same reason, it would seem necessarily to follow, that if there can be a *tort*, which one cannot commit, but in connection with others, that the action must be joint, and could not be several.

But can this be considered a *tort*, in the proper sense of the term. It manifestly wants the ordinary ingredients which constitute it. Here was no violence, or any act denoting intentional wrong. It was an act done *colore officii*, and does not *per se* denote an intention to waste or misapply the funds of the bank; and although an unauthorized act, and for the consequences of which the actors in it may be responsible to the bank, it may nevertheless have been done in good faith, and from a belief that it was authorized by the authority reposed in them as directors. It seems to belong to that class of injuries "for which the law has made no provision, or rather where no general action could well be devised before-hand," and which may therefore be redressed by a special action on the case. [1 Bac. Ab. 72.]

There was no necessity to plead the non-joinder of the other directors, because the plaintiff by his own statement of

his case, shows that he has no cause of action against the defendant individually; a demurrer therefore to the declaration was the proper mode of making the objection.

Proceeding to the consideration of the merits of the case, a majority of the court is of the opinion, that the court below erred in the charge given to the jury, as well as in some of those which it refused.

The power conferred on the directory was a trust of the greatest delicacy, and of the highest importance, in the exercise of which, the utmost good faith on their part was necessary. The undertaking implies a competent knowledge of the duties of the agency assumed by them, as well as a pledge that they will diligently supervise, watch over, and protect the interests of the institution committed to their care. They do not in our judgment undertake, that they possess such a perfect knowledge of the matters and subjects which may come under their cognizance, that they cannot err, or be mistaken, either in the wisdom or legality of the means employed by them. To exact such extreme accuracy of knowledge from this or any other class of agents, to whom of necessity a large discretion in the choice of means must be entrusted, would be manifestly wrong, as it must frequently happen, that after the utmost circumspection and caution, the best possible course would not be pursued, and a loss be sustained, which as the event would show, might have been avoided. The inevitable tendency of such a rule, would be hostile to the end proposed by it, as no man of ordinary prudence would accept a trust surrounded by such perils.

There may doubtless be instances of such gross error, in the conduct of an agent, invested even with great discretionary powers, as to expose him, either to the imputation of such ignorance as is incompatible with the exercise of the duties he has undertaken, or to justify the imputation of fraud.

To apply these general principles to this case. That the directory did not know it was unlawful to employ one of their number as an agent of the bank, and give him a compensation in addition to his salary as a director, for the performance of extraordinary services, is no impeachment of their knowledge as mercantile men; nor does it by any

means demonstrate the want of that skill which would be necessary to qualify them for the station they filled. Indeed, it merely proves they were not skillful lawyers, as well as merchants, and although the act was not lawful, and the director receiving such additional compensation may be compelled to refund it, it is not, if done in good faith, and with the honest purpose to collect and preserve the assets of the bank, an act which would expose the directory to a personal responsibility.

The principles here advanced are sustained by the decision of the Supreme Court of Louisiana, in the case of Percy v. Millaudon, 8 Martin's Lou. R. 68, N. S. That was a suit by the stockholders of a bank, against a portion of the directory, charging them with unfaithful conduct in that capacity. The opinion of the court, which is a very able one, places the question we have been considering, upon the same ground taken in this opinion; and holds, that bank directors are not responsible for errors of judgment, unless the error be of the grossest kind. Among other charges against the directors, was the making allowances to the cashier and attorney of the bank, beyond their salaries. Upon this particular specification, the court say, "as to the charge of voting sums to the officers of the bank, in addition to their salary, we do not see any thing which may not be reconciled to a wish to reward zeal and merit, or what they consider such, in the service of the institution."

The decision in Harman v. Tappenden, and others, 1 East, 535, also sustains the views here taken. That was an action by one corporator, against the other members of the corporation, for disfranchising him, and thereby cutting him off from the benefit of a fishery, which by custom as one of the corporators, he was entitled to. Lawrence, Justice, said, "there is no instance of an action of this sort, maintained for an act, arising merely from error of judgment. Perhaps the action might have been maintained, if it had been proved, that the defendant's contriving, and intending to injure and prejudice the plaintiff, and to deprive him of the benefits of his profits from the fishery, which as a member of this body he was entitled to from the custom, had wilfully and mali-

ciously procured him to be disfranchised, in consequence of which he was deprived of such profits," &c.

This appears to us to be fully in point in principle. For if persons acting in a corporate capacity, are not responsible to another corporator, for a wrong done to him, in violation of law, unless done from malicious motives, certainly an agent of a corporation, ought not to be responsible to it, for an act which though unlawful, was done in good faith, and in the exercise of the power vested in him.

In such cases the *quo animo* is the gist of the matter, and an act is actionable, or otherwise, according to the intent with which it was done. In this particular case, there would be great injustice in holding these directors liable for a mistake of law, committed in the honest exercise of their duties. In the language of the case cited from 8 Martin, 68, *supra*, "it would require from them, knowledge and learning, which the law only presumes in those who have made the jurisprudence of their country the study of their lives, and which knowledge often fails them, from the intrinsic difficulty of the subject, and the fallibility of human judgment."

Our opinion therefore is, that the directors are not responsible individually, for the act complained of, if in the appointment of the agent, they acted in good faith, and with a view to the promotion of the interest of the bank.

Let the judgment be reversed, and the cause remanded.

COLLIER, C. J.—I concur with my brother ORMOND upon the last point examined by him. In respect to the question whether the directors of the bank were severally suable, I have not considered it; and consequently express no opinion upon it.

GOLDTHWAITE, J., *dissenting*.—My judgment leads to a different conclusion from that expressed as the opinion of a majority of the court upon the point decided; and also to a different opinion from that of Judge ORMOND with respect to the joinder of all the directors composing the majority in the action.

On both points, I find expressions elsewhere used which convey my impressions with sufficient brevity and precision. "If several are jointly bound to perform a duty, they are liable jointly and severally for the failure or refusal; and if it is a duty which a majority of the number is bound to perform, those who by their refusal prevent the concurrence of a majority, are answerable to the party injured; that is, all those who constitute a majority—such majority committing the *non feasance*—violate the duty imposed, disobey the law, occasion the injury, and are accountable for it." [Ferguson v. Kennoull, 8 Clarke & F. Part. Ca. 289.] This is given as the law applicable to the members of a collective body who by law are required to perform a particular duty, and, as it seems to me, is not less clearly the law when the majority of a collective body does an illegal act. I entirely concur, that when a discretion is allowed, the party cannot be liable, no matter how injudiciously it may be exercised. But if one class of illegal acts is to be excused on the reason that the illegality was a question of difficult solution, and upon which individuals might differ, it is not easy for me to see why the same reason should not cover all other illegal acts which are committed under a mistaken impression. I am not aware of any exception to the rule, that *an illegal act accompanied with injury* may be redressed by action.

My impression is, the cases cited from Louisiana, and considered by the majority of the court as in accordance with their opinion, does not sustain the position assumed. I infer the salaries of the officers of that bank, as they are in most other private banks, were under the control of the direction, and not as here, regulated by a special enactment; if so, the difference between that case and this is apparent. If the fact be otherwise, I am constrained to doubt the correctness of that decision.

I might extend this opinion, by citing other decisions to sustain my views; but all those made in the courts of England on this branch of the science, are collected in the case I have quoted.

HUNLEY'S EXR'X v. SHUFORD.

1. The commencement and continued prosecution of a suit, within eighteen months from the grant of letters testamentary, is a presentation of a claim against the estate of the deceased, within the meaning of the statute.

Error to the County Court of Lowndes.

BOLLING, for the plaintiff in error.

N. COOK, for the defendant in error.

COLLIER, C. J.—The only question in this case is, whether the commencement and continued prosecution of a suit, within eighteen months from the grant of letters testamentary, is a presentation of the claim within the meaning of the statute. By the writ, with the indorsement thereon, the defendant is informed of the nature of the demand, and that the plaintiff insists upon its payment. He could not be more effectually advertised of both these facts, if the claim was formally presented to him, and payment demanded. There is nothing in the statute which requires the institution of a suit against an executor or administrator, to be preceded by a positive demand, and certainly in point of practice it has never been deemed necessary. This view is in conformity to the ruling of the county court, and its judgment is consequently affirmed.

DEARING v. WINDHAM.

1. In a suit between the mortgagee of slaves and a subsequent vendee of the mortgagor, the latter is a competent witness, as his interest is balanced.
2. The act of 1845, rendering mortgagors, or defendants in execution incompetent witnesses in *trials of the right of property*, does not cover the case of a mortgagee suing a subsequent purchaser from the mortgagor.
3. Where the record recites a deed as proved, the court will presume it was by the subscribing witnesses, and the exclusion of the mortgagor, will not be sustained on the presumption that he was rejected because the subscribing witnesses were not first called.

Writ of Error to the Circuit Court of Lawrence.

DETINUE, by Dearing against Windham, to recover certain slaves.

At the trial, the plaintiff made title to the slaves sued for, through a mortgage executed to him by one Jackson, on the 24th October, 1840. He also offered evidence to show the execution of a bill of sale to the same slaves, by Jackson, to one Grant, on the 3d January 1842, and the execution of another bill of sale by Grant to the defendant, for the same slaves, on the 27th March, 1843. The plaintiff then read in evidence the note from Jackson to him, described in the mortgage, and offered the deposition of Jackson to prove its execution and consideration. The court excluded this deposition, on the ground that Jackson was incompetent as a witness.

The plaintiff excepted, and this matter is the only error assigned.

J. B. SALE, for the plaintiff in error, insisted—

1. The mortgagor is not incompetent at common law, as his interest in a case like this, is entirely balanced.

2. The act of 1845 does not apply to this case—1st, because it was passed after the execution of the mortgage, and

it is against common right to put a construction on it which will affect the party's right to the evidence which then was proper and legal. 2d, because that act extends only to suits to which execution creditors are parties.

L. P. WALKER, for the defendant in error, argued—

1. The present suit is within the mischief intended to be cut off by the act of 1845. [Hodge v. Thompson, 9 Ala. Rep. 131.]

2. Independent of this, the witness has a resulting interest, and for this reason is incompetent. [Stewart v. Fowler, 3 Ala. Rep. 629.]

3. There were witnesses to the deed of mortgage, and thus the grantor was not a competent witness to prove the consideration. [Cunliffe v. Loftin, 2 East, 183; Laing v. Raine, 2 B. & P. 85; Abbot v. Plumb, Doug. 216; Fox v. Reil, 3 John. 47; Jones v. Brewer, 4 Taunt. 46; Johnson v. Mason, 1 Esp. 89; Rex v. Harringworth, 4 M. & S. 350; Willoughby v. Carleton, 9 John. 136; Call v. Dunning, 4 East, 53.]

GOLDTHWAITE, J.—We think an examination of this case will show, the interest of the witness is entirely balanced between these parties. Conceding there is a trust resulting to him in the event the debt secured by the mortgage is paid, the moment that it is so, the title of his subsequent vendee would at once attach. It is this circumstance which distinguishes this from the case of Stewart v. Fowler, 3 Ala. Rep. 629. And the case of Hodge v. Thompson, 9 Ala. Rep. 131, has no influence, because in that, and the decisions which induced it, the witness, at the time of the trial, had received the benefit of the sheriff's sale, and would thus receive a double benefit in the event his trustee should recover in the suit. As early as the case of Jones v. Park, 1 Stewart, 419, it was the law of this court, that the vendor was a competent witness in a suit between persons both claiming by purchase from him, and the same doctrine is held in Frost v. Hall, 3 Wend. 386; Miller v. Little, 1 Yeates, 26, and Worcester v. Eaton, 11 Mass. 368. See also, as connected with the general subject, Leiper v. Gewen, 8 Ala.

Rep. 326 ; Pruitt v. Lowry, 1 Porter, 101 ; Holman v. Arnett, 4 Ib. 63.

2. The effect of the act of '45 is, to render the mortgagor, when the defendant in execution, an incompetent witness between one claiming against the mortgage as an execution creditor, in one peculiar suit, of the trial of the right of property. [Yarborough v. Moss, 9 Ala. 390 ; Brumby v. Langdon & Co. 10 Ala. 747.] We are not aware of any evils which this statute was intended to cover, not included by its terms, as the decision in Hodge v. Thompson, 9 Ala. R. 131, shows the witness is incompetent in a suit against the purchaser at the sheriff's sale. We think it clear, this statute does not affect the competency of this witness, under the circumstances in proof.

3. It is said, however, the subscribing witnesses should have been called to testify to the consideration of the deed. We shall presume this was done, as the bill of exceptions states the deed was proved to the jury.

Conceding the subscribing witnesses were properly called to prove the execution of the deed, we are not aware the fact of consideration must also be proved by them, or rather that the parties are not to be permitted to prove it by any one else. All the cases cited to this point of the case, by the defendant, only show, the subscribing witnesses to a deed must be produced, or their absence accounted for, before it can be proved by secondary evidence. We admit the general doctrine, but cannot see that it affects the question on the record.

On the whole, we are clear the witness was competent, and his deposition should have been admitted.

Judgment reversed and cause remanded.

TERRELL, ET ALS. V. GREEN, ET ALS.

1. A conveyance being made of land and slaves, to a husband in trust for his wife and children, his possession of the property will be referred to the deed, and that he holds it as trustee merely, unless he does some act, demonstrating his intention to assert his marital rights over it. If he dies without manifesting such intention, and before any creditor has in his name asserted such right, the interest of the wife in the property will survive to her.
2. Signs or badges of fraud are repelled, by showing that a full consideration was paid for the property, but the proof of fairness would be more stringent, than if such badges of fraud did not exist.

Error to the Chancery Court of Montgomery.

THE bill was filed by the plaintiffs in error, judgment creditors of John S. Green. It charges that whilst the suits were pending in Hancock county, Georgia, in the year 1828, John S. Green left Hancock county clandestinely, and came to Alabama, bringing with him a number of slaves and other personal property then belonging to him. That shortly before his removal, or soon after his arrival in Alabama, John S. Green fraudulently transferred his property to his brother, Joseph A. Green, in trust for his wife and children.

That they instituted suits against J. S. Green, in the circuit court of Montgomery in this State, and recovered judgments against him, founded upon the judgments obtained in Georgia, upon which execution has issued, and been returned no property found.

That in the year 1835, Joseph A. Green conveyed by deed to John S. Green, twenty-two slaves, in trust for the use of his wife and children, which they insist conveyed a joint and undivided title to the slaves to him and his children. That they are the same slaves removed from the State of Georgia, or others bought from the proceeds of their sale. That in the year 1837, John S. Green died, and Joseph A. Green be-

came his administrator and the guardian of his children, and has reported the estate insolvent.

That Lucy, the widow of John S., and Joseph A. Green as guardian on the death of John S., took possession of the slaves mentioned in the deed, and have retained possession ever since, deriving large profits therefrom, &c. but refuse to pay the just debts of John S. Green. The prayer of the bill is, that the deed of trust be declared fraudulent and void—that the slaves be sold for the payment of their debts, and for general relief, &c. The deed of trust is appended to the bill as an exhibit. The bill was filed in March, 1843.

An amended bill charges, that before the negroes were removed from the State of Georgia, John A. Green, upon some pretended consideration, executed to Joseph A. Green, a bill of sale for the whole or most of the slaves. That John S. was then in great pecuniary difficulties, and in making the conveyance intended to evade the payment of the debts then due by him, or to place the slaves beyond the reach of the executions then issued, or to be thereafter issued. That Joseph A. Green, or Thornton Talliaferro, his agent, then knew, or had good reason to believe, that the condition of Joseph A. was as stated, and his motive such as here set forth, and further charges, that there was a secret agreement between the parties, that the slaves should be held in some way for the benefit of John S. Green, and his family. That at the time of the conveyance, there were unsatisfied judgments of complainants, and others, which, by the statute law of Georgia, were a *lien* on the slaves.

The bill proceeds to state other facts, indicating fraud—as that the slaves were removed to Alabama in a very short time after the sale, in the night, and secretly, on the Sabbath, travelling unfrequented and circuitous paths. That John S. came to Alabama with the slaves, and resided on, or near the plantation, and so continued to reside until his death, &c. That for three years previous to the date of the deed of trust, John S., or his family, had the possession or benefit of the slaves; and that he or his family, were supported from the labor of the slaves, with the privity of Joseph A. Green. The bill further charges, the purchase of a tract of land by John S. Green, with his own money, and the title taken in

the name of Joseph A. for the purpose of defrauding the creditors of John S.

The bill further charges, that the sale of the slaves was made to secure a debt due by John S. to Joseph A., and being executed in the State of Georgia, was within the meaning and influence of a statute of that State, which declares such transfers of property fraudulent and void, as against the creditors of the grantor.

Joseph A. Green answered the bill, and denied all the material allegations. He sets up a purchase of the slaves from his brother, in payment of a debt due from him, secured by four promissory notes, which he makes an exhibit, they having been found by his brother's widow, after his death, among his papers. The purchase money of the twenty slaves being \$4,519, which he says was a full and fair price for them. The residue beyond the notes held by him on John S., being paid in cash, at the time. He positively denies any fraudulent intent in the purchase—denies knowing that his brother was seriously embarrassed, but supposed he was perfectly solvent. That he received possession immediately, and employed an agent to bring the slaves to this State, where he was about removing. That when they reached here, they went into his possession, and there remained until the 11th August, 1835, when he conveyed them by a trust deed, since which time they have been in the possession of John S. and his family. That having been very successful in plaining, and improving lands, with the slaves purchased from his brother, and he being in bad health, from the love and affection he had for him and his family, he made the conveyance to them.

He denies the secrecy imputed to him in bringing out the slaves; that the trade was concluded on Monday, and he told his agent to set out immediately, and take the usual road and he presumes he did so. The agent has been long since dead. In reference to the land, he denies all the allegations of the bill, and says it was purchased by Mrs. Ware, the mother of John S., and himself, for a home for the wife and children of John S., and for their sole and separate use. He relies upon the laches of the complainant, and pleads the sta-

tute of limitations as a bar to any relief, and also relies on the statute of non-claim.

The widow of the deceased, and Merrjll, her present husband, answer, adopting the answer of Joseph A. Green in all respects. The children, by their guardian *ad litem*, answer, and call for proof of all the allegations of the bill.

Much testimony was taken, which, so far as it is pertinent, is noticed in the opinion of the court.

The chancellor considered the fraud in the sale of the slaves as sufficiently established, but refused relief, because of the staleness of the demand; and of the statute of limitations set up by way of plea.

The assignments of error, present for revision the entire case made by the bill and answers.

Cocke, for plaintiff in error.

T. WILLIAMS and McLESTER, contra.

ORMOND, J.—The first inquiry which presents itself is, what is the character of the sale made by John S. Green, to his brother Joseph A. Green. The bill charges it to be fraudulent. That John being greatly embarrassed, with judgments about to be obtained against him, made a pretended sale of the slaves to his brother, who held them in trust for him, and finally reconveyed them to him and his family.

The defence is, that it was a *bona fide* purchase of the slaves for their full value; that there was no trust, either express or implied, that the slaves should be held for John S. Green, or his family; and that they were finally reconveyed to the family of John S. as a gift, without any other consideration, than that of love and affection.

The most material inquiry is, as to the consideration, for if that was really paid, and was a fair price for the slaves, it neutralizes most of the facts relied upon as badges of fraud. The defendant, Joseph A. Green, whose answer upon this point is strictly responsive to the allegations of the bill, is evidence for him. He denies all intention of defrauding any one; denies that he knew his brother was insolvent, and circumstantially relates every thing connected with the purchase. He states that he lived some sixty miles distant from his bro-

ther John, who was indebted to him about \$4,500, for which he held his notes. That in the fall of 1828, intending to purchase land in Alabama, he called on his brother to get his money, but failed to obtain it. That he came to this State and purchased land, and on his return again called on his brother, who being unable to pay, agreed to let him have slaves at valuation. That he took them at the appraised value, and took a bill of sale of them. That he then employed an agent, (Thornton Talliaferro,) now dead, to carry them to his plantation in Alabama, he returning to his house in Georgia. That they remained in his possession, until by their labor they had realized what he paid for them, when he made a free gift of them to his brother's family, he being poor and in bad health.

This transaction, so far as it relates to the consideration, and the circumstances attending the sale, is fully sustained by W. G. Green, who was examined by the complainants. He proves that John was indebted to his brother Joseph, for which the latter held his notes. That in the fall of 1828, these notes were sent to him for collection by his brother, in anticipation of his visit to Alabama to purchase land. That on his way to this State he called for his money, but could not get it, and on his return from this State, having purchased land, again insisted on payment, offering to take property. This offer resulted in his taking the negroes, at the value assessed upon them by the three brothers. He knows of no trust, either express or implied. He further states that Thor. Talliaferro, their brother-in-law, was not present when the valuation was made, but coming in afterwards, said the appraisement was too low, and thereupon Joseph agreed to pay, and did pay, John \$500 more, making the purchase money \$5,000. This fact, which, coming from the plaintiff's own witness, cannot be questioned by him, and is doubtless true, stamps the true character of this transaction, and shows it to have been a real, and not a sham sale, for the purpose of defrauding creditors.

The same facts are also established by Benjamin Cook, the father-in-law of John S. Green. He also gives a list of the slaves, with the estimated value of each, many of them being young children, and says the price given for the slaves

was more than they would have sold for at the the time, as negroes were then very low, a fact which this court knows as matter of history. These witnesses prove also, that the notes held by Joseph, on John Green, were given up to him at the time, and these notes are appended to the answer of Joseph Green, having been handed to him, as he says, by the widow of John Green, after his death. They bear date in 1824, 1825, and 1827, and purport to be signed by John S. Green. We must presume that these signatures are genuine, as they were open to inspection, and have not been contested. Assuming that they are genuine, the inference is irresistible, that they evidence real transactions, not only because they correspond with the testimony of the witnesses, but because there could have been no necessity for their fabrication, so many years in advance of any supposed necessity for their production, John S. Green having died eight years before this bill was filed. Nor indeed, was their production at any time necessary, as the legal inference would have been, that they were destroyed, and the supposition that they were fabricated, imputes if possible more folly, than guilt to the supposed actors in it. They must doubtless be considered as genuine papers, and though they are proof which could not have been demanded, when produced they are strong confirmation of the fact of the indebtedness of John S. to Joseph A. Green; as no one can be presumed to execute notes for the payment of money, extending over a series of years, without any assignable motive, who is not really indebted. But independent of this presumption, arising from the notes themselves, the indebtedness of John to Joseph is fully proved.

To repel this proof, it is insisted there are various facts proved, establishing the fraudulent character of the sale. As that the slaves were brought away in the night, and traveled an unusual road to Alabama—that John S. Green came to this State about the same time, and resided near the slaves—that it was a sale of all the slaves of the vendor, leaving none for the performance of the menial offices of the family—that he occasionally exercised control over the slaves, after the sale—and that finally, the slaves went back to the possession of his family. These are doubtless signs, or badges

of fraud, and unexplained, would justify, and indeed, require the court to infer, that the sale was merely colorable. But when it is shown that a full and fair price was paid for the slaves, and possession delivered, and retained for more than six years, the explanation is full and complete.

Badges or signs of fraud, are inferences drawn by experience, from the customary conduct of mankind, which is in general marked by selfishness, and distrust of his fellows. The law therefore acting upon these known principles of human action, will not, against creditors, presume a gift to be made from motives of pure benevolence, but will rather presume a secret, and less worthy motive for the act ; and in favor of creditors requires its purity to be established by satisfactory proof. But when the party shows the property to be his own, and that he has the right to do with it as he pleases, the inference is at once repelled. The utmost that the creditor could ask, would be, that the proof of the consideration should be more stringent, than would be demanded where no suspicion of unfairness existed.

Here the proof is ample to meet the demands of such a case, and were it much less convincing and satisfactory than it is, would be sufficient, when as here, the creditor has slept upon his rights for fifteen years and upwards. During this long interval of time, many facts must have become impossible of proof, from the death of witnesses, as is shown to be the case here, and even as to living witnesses, much must have faded from the memory, and passed into oblivion.

It is certainly a possible case, that a sale may be fraudulent, though a full price is paid for the property, if the intention of the parties was to defraud creditors. But here it is not shown, that Joseph A. Green knew of the insolvent condition of his brother ; he denies all such knowledge. His brother William, who lived near John, deposes that he did not know it, and it certainly would be a rash presumption, that Joseph was better acquainted with his condition, being sixty miles from him. If, however, he did know the fact, he had the right to purchase the property to save his own debt; and no inference could arise that he intended to defraud others, and not to secure himself. To make such a purchase fraud-

ulent, the proof must be clear and convincing, that such was the purpose and intent of the act.

Nothing need be said here, as to the land alledged to have been purchased with the money of John S. Green, as the proof is ample to show, that the land was not purchased with his means, but by his friends for the benefit of his family.

It is further urged, that this contract was void at the time it was made from a law of the State of Georgia, then in force, to be found in Prince's Dig. 164.

The act is as follows: "Whereas a practice of selecting particular creditors by assignments and transfers of property, made by persons indebted, and thereby excluding or defrauding other *bona fide* creditors of their just claims on the estate of insolvent debtors, is contrary to the first principles of equity and justice. To prevent the mischief thereof, be it enacted, &c. that any person or persons unable to pay his or their debts, who shall at any time hereafter, make any assignment or transfer of real or personal property, stock in trade, debts, dues or demands, in trust to any person or persons, in satisfaction or payment of any debt or demand, or in part thereof, for the use and benefit of his, her, or their creditor or creditors, or for the use and benefit of any other person or persons, by which any creditor of the said debtor shall or may be excluded from an equal share or portion of the estate so assigned or transferred, such assignment, transfer, deed, or conveyance, shall be null and void, and considered in law and equity as fraudulent against creditors: provided, nevertheless, that nothing contained in this act shall prevent any person or persons in debt from *bona fide* and absolutely selling and disposing of a part or the whole of his, her or their real and personal estate, so the same be free from any trust for the benefit of the seller, or any person or persons appointed by him, her or them."

We think the clear intention of the legislature in this act was, to break down the practice of giving preferences to certain creditors by deeds of assignment, and to compel debtors making assignments in trust, to place all their creditors on the same footing. This is clearly manifest in the preamble, which sets forth the mischief intended to be prevented, and there is nothing in the body of the act hostile to this declared

purpose. The act in the outset speaks of conveyances in *trust* for the payment of debts, and to this term all the specific conveyances afterwards enumerated must be referred. The proviso, excluding from the operation of the act absolute sales of property made *bona fide* by persons indebted at the time, was doubtless added out of abundant caution, as without it, such must have been the interpretation put upon the law. Otherwise, the act would have withdrawn from commerce the entire property of all persons indebted in the State, which certainly the legislature did not intend, as it would have put an end to all trade. Under this law, a debtor, although unable to pay all his debts, may make an absolute sale of the whole or a part of his property to a creditor, in payment of his debt, provided it is *bona fide*; and if fraudulent, it could be set aside at common law, as well as under this statute. The mischief to be guarded against, was not a payment of one creditor, to the exclusion of others, by an actual *bona fide* sale, for of this as a generally prevailing evil, little danger could be apprehended any where. It was to break up the practice of preferring one creditor to another by a trust, the evils of which have been felt in other countries, as well as Georgia; and as there is nothing impugning the *bona fides* of the sale, we must hold it valid under this statute.

The constitutional provision of the State of Georgia, article 1, § 14, states that no law shall be valid, which contains any matter not expressed in the title, has no application here. This proviso is not the enactment of a law in the sense of the constitution, but is entirely negative in its character, excluding a conclusion from the law which was passed. If the proviso were stricken from the law, it would not vary its legal effect, as the construction would be the same without it as with it.

It is also supposed that John S. Green took an interest under the deed of 1835, which may be subjected to the payment of his debts. The conveyance is of land and slaves to him in trust for the use of his wife, and children then in existence, or afterwards to be born. Upon the arrival at age, or marriage of any of the children, the slaves were to be divided between the wife and children, and he was appointed a

Terrell, et als. v. Green, et als.

trustee, with authority to manage the property for the benefit of the *family*, subject to the limitations of the deed.

As there is nothing in the deed from which it can be inferred it was the intention of the donor to create a separate estate in the wife, the marital rights of the husband attached to whatever interest she had in the slaves. If the legal estate had been vested in the wife, upon its being reduced into possession by the husband, the interest of the wife would have been subject to the payment of his debts. But the estate of the wife being equitable merely, it could only have been made subject to his debts by a proceeding in chancery; and in that court the husband, or a creditor representing him, conceding he had the right to do so, would have been required to make a settlement upon the wife. [Inge v. Forrester, 6 Ala. 418.]

Carleton & Co. v. Banks, 7 Ala. 32, establishes the principle, that after the husband has reduced to possession a chattel, in which the wife had only an equitable title, the interest of the wife might be sold by the creditors of the husband. That was the case of a life estate in a slave, the title to which was in a trustee, with a remainder over after the death of the tenant for life. The possession was yielded by the trustee to the husband, who thereby became invested with the right to the possession during the life of his wife. In this case, there was no such reduction into possession by the husband. He received the possession under the deed, "strictly in trust" for the use of his wife and children, and until the quality of his possession is changed by some act demonstrating his intention to assert his marital rights over the property, his possession will be referred to the deed under which he obtained it. An assignment of his interest for a valuable consideration, would be regarded by a court of equity as a reduction into possession, or he might have applied to a court of chancery for that purpose, but until he manifests his intention of assuming his marital rights, his possession must be considered that of a trustee for his wife and children. [Honner v. Morton, 3 Russ. 68; Johnson v. Johnson, 1 Jac. & W. 450; Kenny v. Udall, 5 Johns. Ch. 473; Elliott v. Cordell, 5 Madd. 150; Andrews v. Jones and

Spears v. Walkley, 10 Ala. 328; see also Fellowes, Wadsworth & Co. v. Tann, 9 Ala. 1002.]

Whether the creditors could have asserted the right of the husband during his life, is a question not presented on the record. By his death it is clear the right survived to the wife.

This disposes of the entire case, and renders it improper to consider the other questions raised at the bar.

Decree affirmed.

KING v. BUCKS.

1. A plea in abatement of an attachment, merely denying the defendant's right to the property levied on by a sheriff, or other officer, is bad on demurrer. The return is matter of record, and cannot be contradicted by extrinsic evidence, upon an allegation which merely denies its falsity.

Error to the Circuit Court of Pickens.

THIS was an action commenced by attachment, on which the sheriff returned, "levied on fourteen bales of cotton." The defendant pleaded in abatement, that the cotton levied on was not his property, at the time the attachment was issued, nor when the levy was made, and concludes thus, "and this he is ready to verify; wherefore he prays judgment, if this court will, or ought to take cognizance of the said plea." The plaintiff demurred, and his demurrer was overruled, and declining to reply, judgment was rendered for the defendant.

B. F. PORTER, for the plaintiff in error, insisted that the plea presented no issuable fact, that it was no answer to the

action to say, that the property levied on by the attachment belonged to a stranger. The plea is further defective in its conclusion. [Story's Pl. 75, 76; 1 Chit. Pl. 386 to 402; 3 Id. 895, and notes; 2 Hen. & Munf. Rep. 308.]

C. E. B. STRODE, for the defendant made the following points: 1. If the levy by the sheriff did not bring defendant into court, so as to attach the general jurisdiction to this particular case, he loses nothing by such an appearance as was made. [Tingley v. Bateman, 10 Mass. 343; Wheeler v. Lampman, 14 Johnson, 481; Gardner v. Barker, 12 Mass. 36; Malcolm v. Rogers, 1 Cow. 1.] 2. As a party must be in court by some manner of service of process, either personal or by publication, or attachment of property, it is a good plea in abatement, that the property attached was not his. [Guild v. Richardson, 6 Pick. 364.] 3. The conclusion, by prayer, that the "writ abate," or whether "defendant shall be held further to answer," are of same import. [Chitty Pl. 895, 897, see precedents.]

COLLIER, C. J.—The levy of an attachment is equivalent to the personal service of process, that is, it has the same effect to give jurisdiction to the court, and entitles it to hear and determine the cause. [4 Stew. & Por. Rep. 184.] It has repeatedly been held, that when an officer returns he has levied an attachment on certain property, it will be intended that it was the defendant's; although the return affirms nothing in respect to the title. [4 Ala. R. 527.] So where the sheriff returned an attachment levied on certain land in the possession of a person not a party to the writ, it will be intended, in order to sustain the proceeding, that it was the property of the defendant, and levied on as such.

In Kirksey, et al. v. Bates, 1 Ala. Rep. 303, the attachment issued against the estate of three, and the sheriff returned, that he had levied on certain property, without expressing whose it was; but the replevin bond indicated that it was the property of one of the defendants. This court was of opinion, that the return alone could be looked to as the source of information of the sheriff's acts, if it be false, it

cannot be questioned collaterally. His declaration must be credited; and if untrue, he will be accountable to the party aggrieved. "As it was the *execution* of the attachment which gave the court jurisdiction, and this right having attached, it will not be defeated, even if the property was permitted by the sheriff to be improperly replevied." So where an attachment returnable to the circuit court was levied on a pair of shoes, after judgment against the defendant, it was objected on error, that the levy was not sufficient to support the judgment; we held, that the levy of an attachment is by statute, equivalent to the service of ordinary process, and is in law the appearance of the defendant. "The levy on a pair of shoes was, if really made, and the shoes were of any value, a sufficient levy to sustain the attachment." "If the levy was fictitious, or merely colorable, it would have been discharged by the court to which the return was made, on motion to quash or set it aside." [9 Ala. 613.]

In *Maverick v. Duffee*, 1 Ala. R. 433, it was decided that a plea in abatement, that the defendant was not served with a copy of the writ, as directed by the statute, is bad on demurrer. The court remarking "that the only mode by which advantage can be claimed, is by motion to set aside the service for irregularity, which can be granted in the exercise of a sound discretion, if it is necessary to prevent an injury to the defendant, or to advance the cause of justice."

The effect of the levy of an attachment, we have seen, is to bring the defendant before the court, and the return is quite as much a matter of record, and as conclusive as is the return of the service of a writ of *capias ad respondendum*; and if the one cannot be controverted, it is difficult to perceive upon what ground the other may be disputed. If a levy is "fictitious, or merely colorable," we have said that it may be set aside by the court; perhaps where it falsely affirms the property levied on is the defendant's, for the purpose of enabling the plaintiff to proceed in his suit, redress might be obtained in the same way. So where the officer is not satisfied that the property he seized was liable to the attachment, he may, on application to the court, obtain permission to amend his return. But following the analogy of

the cases cited, a plea in abatement, merely denying the defendant's right to the property levied on, cannot be supported. Such a plea would deny the return, which must be regarded as a record, and when too it stated no other ground than its falsity for the admission of parol evidence to contradict the record. Our conclusion is, that the judgment of the circuit court is reversed, and the cause remanded.

WOOLEY v. CLEMENTS.

1. A bill of exchange payable twelve months after date, when the nominal day of payment falls on Sunday, is notwithstanding allowed three days of grace, and is properly protestable on the Wednesday following.

Writ of Error to the Circuit Court of Tuskaloosa.

ASSUMPSIT by Clements as the indorsee of a bill of exchange against Wooley as the second indorser. The bill is described as dated the 23d of February, 1844, payable twelve months after date, and negotiable and payable at the Bank of the State of Alabama.

At the trial, it appeared in evidence that the 23d day of February, 1845, was Sunday, and the bill was protested for non-payment on the 26th of the same month.

On this state of proof, the defendant requested the court to charge the jury, that the bill was not protested on the day when by law it was protestable. The charge was refused, and this is the only error assigned.

B. F. PORTER, for the plaintiff in error, insisted that as the bill fell due on Sunday, it was demandable by the law mer-

chant on the previous day, and therefore should have been protested on the Tuesday afterwards. [Chitty on Bills, 410, 404; Story on Bills, § 335, 338, and note 1; 5 Con. Rep. U. S. 101.]

P. MARTIN and HUNTINGTON, contra.

GOLDTHWAITE, J.—We think it does not admit of question that this bill was protested on the proper day. The twelve months for which it run expired on the 23d of February, and although it was then at maturity, yet by the commercial law, the parties were not in default until the last day of grace. All the text writers agree that if this fell on Sunday, the protest should be made on Saturday. [Chitty on Bills, 410, a, and American cases cited in note 1; Story on Bills, § 337, 338.] The latter writer says, the reason of all this doctrine seems to be, that as the allowance of the days of grace is a mere indulgence to the acceptor, it shall be granted only in cases when it will not work any extra delay to the holder of the bill; but he shall be entitled to strict payment at the *punctum temporis* of the bill. If any other rule were adopted, the holder would be compelled to lose the use of his money for four days. [Story on Bills, § 341.] This reason, whilst it prevents four days of grace being demandable in any case, certainly cannot take away the right to three, except in the precise contingencies that are spoken of; and although the nominal maturity of the bill falls on Sunday, the days of grace are not thereby abridged.

Let the judgment be affirmed.

E. B. AND J. COLGIN v. THE STATE BANK.

1. The notice which the law requires to be given in summary proceedings, is sufficient, if it describe the debt upon which the motion is to be made with reasonable certainty.
2. When the Bank moves for judgment against two defendants, one, though a surety and released by his principal, is not a competent witness for the other.
3. An indorsement on the note, of the sum for which it was discounted, and the date of the discount, is an admission on the part of the Bank, of the sum lent upon the note, of which the defendant may avail himself, as otherwise the inference would be, that the Bank was entitled to recover the entire amount.
4. The Bank Commissioners appointed under the act of 1846, whether by the Legislatnre, or by the executive to fill a vacancy, are public officers, of whom all courts will take judicial notice.

Error to the Circuit Court of Tuscaloosa.

THIS suit was commenced by motion. On the 14th July 1841, a notice was issued by the President of the Bank, as follows :

To Edward B. Colgin, William R. Colgin, and John Colgin—You are hereby notified, that the President and Directors of the Bank of the State of Alabama, will, by their attorney, move the circuit court to be held for the county of Tuscaloosa, at the court house of said county, on the third Monday of September next, for judgment against you on a note due from you to the State Bank, discounted on the 27th March, 1839, for eighteen hundred dollars, payable to the President and Directors of said Bank, ninety days after the date thereof, and negotiable and payable at said Bank, when and where, &c.

This notice was returned executed on the plaintiffs in error.

At the September term, 1841, of the court, (as appears from a bill of exceptions,) the motion indicated by the notice

Colgin v. The State Bank.

was docketted, and continued ; at the succeeding March term the death of W. R. Colgin was suggested, and the motion abated as to him, and the cause continued. At each succeeding term of the court, until the September term, 1846, the motion was continued, sometimes by the plaintiff, and at this term, when the motion was called, the court was moved not to take jurisdiction, because it did not appear of record that the notice was produced, and the motion indicated by it submitted to the court at the September term of the court, 1841, which motion the court rejected, and the defendant excepted. The defendant, John Colgin, then pleaded *non assumpsit*.

The plaintiff then read the notice, and offered to read a note as follows :

\$2,000.

Sumter Co. 1839.

Ninety days after date, I, Edward B. Colgin, as principal, and William R. Colgin, and John Colgin, as securities, jointly and severally promise to pay the President and Directors of the Bank of the State of Alabama, or order, two thousand dollars, for value received, negotiable and payable at said bank.

E. B. COLGIN,

W. R. COLGIN,

JOHN COLGIN.

On the left hand margin, on the face of the note, was written in red ink, "Disc't 27th March, 1839, for eighteen hundred dollars."

The defendant moved to exclude the note from the jury, upon the ground that it was not properly described in the notice, and for the variance between the note offered, and the notice, which was overruled, and the defendant excepted.

The plaintiff also offered in evidence a paper, partly printed and partly written, which was attached to the note by wafers, as follows :

Tuscaloosa, May 23d, 1846.

We, the undersigned commissioners, and trustees, under the act of the legislature of the State of Alabama, entitled an act to regulate the affairs of the banks, and to provide for the payment of the State bonds, approved February 4th, 1846, hereby certify that the note hereto attached, is really and

bona fide the property of the President and Directors of the Bank of the State of Alabama.

F. S. LYON,

WM. COOPER,

C. C. CLAY,

P. P. Wm. Hawn.

The plaintiff also produced and read, a power of attorney from F. S. Lyon, Wm. Cooper, and C. C. Clay, styling themselves commissioners and trustees, appointed under the act of the 4th February, 1846, to William Hawn, by which they appointed him their attorney, to make the certificate, which previous to the passage of the aforesaid act, was required to be made by the President of the Bank, necessary to the conduct or management of suits for, or in favor of the bank—which was dated 18th April, 1846.

To the reading of the certificate the defendant objected, but the court permitted it to be read, and the defendant excepted.

This being all the testimony of the plaintiff, the defendant offered to read a deposition of E. B. Colgin, he having been released before it was taken by the defendant.

The plaintiff objected to the reading by the defendant of the deposition, because the deponent was a party to the record. The counsel in the cause stated to the court, and offered to verify it by affidavit, that they never had been counsel for E. B. Colgin, or appeared or pleaded for him, but they appeared and pleaded only for John Colgin. The court sustained the objection, and the defendant excepted.

This being all the evidence in the cause, the defendant asked the court to charge the jury, that on this evidence the plaintiff could not recover, which the court refused, and charged the jury, that on the evidence, they must find for the plaintiff.

The defendant then moved the court to charge, that if there was no other evidence that said note was discounted by said bank, except the memorandum in red ink, and there was no evidence by whom the said memorandum was made, that then the plaintiff could not recover; which the court refused to give, but charged the jury, that all that appeared on the note was evidence of itself, without further proof. To

the charges given, and to those refused, the defendant excepted.

The assignments of error present all the questions raised upon the record.

PECK, for plaintiff in error.

P. MARTIN, contra.

ORMOND, J.—The first point made, that the motion was discontinued because not made at the first term, and continued, is not sustained by the record. It does appear from the bill of exceptions, that the motion was placed on the docket at the September term, 1841, that being the term at which the motion indicated by the notice was to be made, and regularly continued from that term, down to the trial of the cause. Whether, if such had not been the fact, it would not have been waived by the subsequent appearance of the defendant, and the continuance of the motion at his instance, is a point we need not now determine.

The defendant having appeared and pleaded, and an issue being made up and submitted to a jury, the proceeding lost its summary character, except that to sustain the jurisdiction it was necessary to show, that the note sued on was the property of the bank; in all other respects it is to be governed by the rules which regulate suits commenced in the ordinary mode. This question was fully considered in *Smith v. The Branch Bank at Mobile*, 5 Ala. 26, where the result of all the cases on this subject is stated to be, that "if the defendant appear, it will be evidence of notice, and if an issue is made up between the parties and submitted to a jury, it is then like any other cause commenced in the ordinary mode, except that it must appear upon the record that the court had jurisdiction to entertain the motion."

Here the defendant appeared; there was therefore no necessity for the production of the notice, as that was admitted by the appearance. The plea of the defendant, when an issue is tendered, is not to the notice, but to the motion, which the plaintiff makes for judgment upon the debt sought to be recovered. It was not therefore competent for the defendant,

having pleaded to the merits, to move a rejection of the note, for a variance between that and the notice. But as a material difference between the note, or other security offered in evidence, and that described in the notice, would be an available defence to the defendant, either by plea, or by a motion to quash the proceedings, and as the whole proceeding was conducted without any regard to form, and the notice was in fact produced and read by the plaintiff, we will consider it as if the appropriate motion had been made by the defendant.

The notice being merely designed to apprise the defendant of the intended motion, nothing more is necessary, than that it should describe the debt upon which the motion was to be made with reasonable certainty. The rules of the common law in respect to a variance in pleading, have no application to such a case as this. Indeed, the statute does not in terms require the notice to be in writing. This precise question arose in this court at an early day in *Lyon v. The State Bank*, 1 Stew. 442. The notice in that case was identical in its terms with the present, and on a motion to quash, the court held it to be sufficient, saying that a notice in writing, which so far identifies the debt for which judgment will be moved, as to afford reasonable certainty, is sufficient. This is the leading case upon these summary proceedings, and has been adhered to from that day to this. Nor if the question was now open, would it be possible to doubt, that this notice did give the defendant full information of the precise debt, upon which the motion was to be predicated, and this was all the statute contemplated. If necessary, it would also be worthy of inquiry, whether such a motion could be entertained, five years after the appearance of the party.

The case of *Turner v. Lazarus*, 6 Ala. 875, is a decisive authority in favor of the decision of the court below, respecting the deposition of E. B. Colgin. The bank could have selected one of the makers of the note, or have embraced them all in its motion for a judgment. It did move for a judgment against E. B. and J. Colgin, and this in its effect is precisely the same as if it had commenced a suit in the ordinary mode against them jointly; and as in the latter case a discontinuance as to one, or a judgment in favor of one,

would be a discontinuance of the entire action, it follows that E. B. Colgin was not a competent witness for his co-defendant. It does not change the rule, that one of the parties is a mere surety, being sued jointly, the judgment must be joint, either for or against both; and a several judgment in favor of one defendant, would be a discontinuance of the action as to the other.

The charge moved for by the defendant, that the plaintiff could not recover, without proving by whom the memorandum in red ink on the face of the note was made, proceeds upon the supposition, that the *onus* of proving for what amount the note was discounted, lay upon the bank. The necessary inference from the appearance of this note, and the attending circumstances, is, that the note was made and offered to the bank for discount. It is filled up with the sum of \$2000, and is without a date, and the writing upon the face of the note in red ink, is for the purpose of showing what sum was lent upon the note, and the time when it was lent. The fact that the bank had possession of the note, is *prima facie* evidence of title, which it could only obtain by a discount of the note, and if the bank had not made this entry upon the face of the note, the presumption would be that it had discounted the note for the entire amount for which it was executed, and it would have devolved upon the defendant to aver and prove, that it was discounted for a less sum than the note on its face called for. The only effect then of the memorandum on the face of the note, was an admission by the bank of the true sum due upon it. From this it appears, that the court correctly refused the charge which was moved for, and although the court erred in the charge which was given, considered as an abstract legal question, it was an error which, so far from prejudicing, benefited the defendant, as without the memorandum, the possession of the note was evidence of title in the bank for the full amount.

In Findley v. The State Bank, 6 Ala. 244, we held that when the bank refused to discount a note, unless additional security was given, the mere possession of the note, no additional security being given, was not evidence that the bank had afterwards discounted it. Here no suspicion was cast

upon the title of the bank, and the possession was evidence *prima facie* of ownership.

The remaining question relates to the jurisdiction of the court, which depends upon the validity of the certificate made by Mr. Hawn as the agent of the bank commissioners, that the debt was *bona fide* the property of the bank.

The objections which have been taken to this certificate, involve a consideration of the true character of the commissioners, appointed under the act of the last session of the legislature, "to regulate the affairs of the bank, and provide for the payment of the State bonds." This act vests the entire interest of the State in the State Bank and its branches, in certain persons, for the purpose of collecting the debts due the bank, and for the payment of the State debt, giving to them large discretionary power, and before entering upon their duties, they were required to execute a bond, and take and subscribe an oath, which were to be filed in the office of the Secretary of State.

It is very clear that the commissioners are public officers, whom the court will judicially notice, as well from the nature of their appointment, as the character of the trust reposed in them, which concerns all the people of the State. This is not denied as it respects the commissioners elected by the legislature, but it is supposed that Mr. Clay, who was appointed by the Governor to fill a vacancy, does not stand in the same predicament. We are not able to perceive any difference in principle between the two cases. An appointment by the executive, during the recess of the legislature, is of the same force and validity for all purposes, during the period for which it was made, as if made by the legislature. He is in such cases the appointing power, and is not the less so, because the appointment is made "with the concurrence of the remaining commissioners." He is notwithstanding the source of the power, and the right of the commissioners is a mere veto upon his nomination, if not acceptable to them. Besides, his bond and oath of office are on file in the office of the Secretary of State. In a word, the high public trust reposed in these commissioners, the source from which their title to the office emanates, and the evidence of their right to exercise it on file among the archives of the government,

demonstrate that these officers, whether appointed by the legislature, or by the executive, belong to that class, of which it is the duty of all courts to take judicial notice.

But if the appointee of the executive had not the same attributes as those appointed by the legislature, the act of the majority of the commissioners would be valid, and would not be affected by the fact, that an unauthorized person united with them in its execution. It is a well recognized principle, that where business of a public or judicial nature is entrusted to several, the majority may act. [Grindley v. Barker, 1 B. & P. 228; Com'rs of Alleghany Co. v. Leckey, 6 S. & R. 170; Downing v. Ruger, 21 Wend. 182.] We are therefore clear, that both on principle and authority, in any possible aspect of this case, the power to Mr. Hawn was well executed.

It is further insisted, that although the power given to Mr. Hawn may be valid, it was not executed by him in conformity to the act. The 10th section of the act, authorizes the bank commissioners, "or any agent or attorney appointed by them," to make the certificate previously required to be made by the president of the bank, that a debt sued for by motion, was the property of the bank.

Considering the nature of the act to be performed, a mere allegation of the existence of a fact, which is to be taken as true only *prima facie*, and the whole effect of which is a slight modification of the remedy, we are by no means certain, that the agent may not make the certificate in his own name. But it by no means follows, that he may not also act in the name of his principal. The terms "attorney," and agent, *ex vi termini* import a delegation of power from another, and by the established principles of law, all acts done under a delegated power, must be in the name of the principal. The employment of these terms, with the import of which the legislature were doubtless familiar, certainly authorized the agent when appointed, to act in the name of his principal; and if the language of the act is broad enough to justify him in making the certificate in his own name, it would only prove, that the legislature in its anxiety to provide for the exigency, gave the power in the alternative, to

be exercised in either mode, as might be considered most advisable.

The question whether Mr. Hawn signed the certificate, is not made upon the record. The plaintiff produced the power of attorney from the commissioners to Hawn, and then produced and offered to read his certificate that the note was *bona fide* the property of the bank. The defendant "objected to the reading of this paper as sufficient for that purpose," the plain import of which is, a denial of the efficacy of such a certificate, to give the court jurisdiction to proceed in that mode. If the objection had been, that there was no proof that such a certificate had been made, it should have been, and doubtless would have been so stated. We are therefore relieved from the necessity of entering upon the inquiry, whether such proof is necessary.

Let the judgment be affirmed.

NICHOLAS v. KREBS, EX'R.

1. The defendant made a writing of the following tenor, viz: "Good for three hundred dollars. Jan'y 15th, 1829." *Held*, that it was competent for the plaintiff to show, by parol evidence, that it was delivered to, and intended to acknowledge a liability to him; but such evidence of an agreement made simultaneously with the writing, is not admissible, to show it was understood between the parties, that there was no present indebtedness, or that it should be payable at a future day, so as to postpone the time when the statute of limitations began to operate.

Writ of Error to the Circuit Court of Mobile.

THIS was an action of assumpsit, by the defendant in error, as executor, &c. of Catherine Swanson, deceased. The first count of the declaration alledges, that the defendant below, on the 15th January, 1829, made his writing of that date,

and thereby acknowledged himself to be good for the sum of three hundred dollars; which writing he delivered to the testatrix; by means whereof the defendant became liable to pay to the testatrix, the sum of money therein mentioned, "presently." The declaration also contains the common counts in assumpsit. Among other pleas, the cause was tried on the general issue, the statute of limitations, and payment.

From a bill of exceptions, sealed at the defendant's instance, it appears that the plaintiff gave in evidence a writing of the following tenor: "Good for three hundred dollars. Jan'y 15th, 1829. W. S. Nicholas," and then introduced a witness, who testified that he presented the same to the defendant for payment; to which the latter answered, that the note was unpaid—the consideration of it was money given to him to lend out, that he had lent it, and it was lost. The court charged the jury, if they believed, from the admission of the defendant, that the money for which the note was given, was handed to the defendant to be lent out by him, then he was merely an agent for the plaintiff's testatrix, and the statute of limitations did not begin to run against the claim, until after the demand of payment was made. A verdict was returned for the plaintiff, and judgment thereon rendered.

H. CHAMBERLAIN, for the plaintiff in error, insisted that the testimony which contradicted or varied the terms of the writing was inadmissible; and the circuit court incorrectly ruled the law, in charging the jury that the statute of limitations did not begin to run until after a demand was made. [8 Por. Rep. 211; 7 Ala. Rep. 641.]

J. H. SMOOT, for the defendant in error. The admissions of the defendant below, as related by the witness, do not contradict the terms of the writing—they merely show in what character he received the money. They establish a clear case of principal and agent—an acknowledged and continuing trust; against the former the statute of limitations does not begin to run previous to a demand, and against the latter not until the trust is in some manner put an end to, or disavowed. [6 Porter's R. 32; 4 Ala. R. 645.]

COLLIER, C. J.—Although the writing given in evidence to the jury in this case, does not indicate upon its face the name of the payee, yet it was competent to show by extrinsic proof, who was the party to whom it was delivered, or in whose favor it was intended to acknowledge a liability. Such evidence is admissible upon the ground that the writing is manifestly incomplete. [3 Phil. Ev. C. & H.'s Notes, 1471, *et seq.*

It has been repeatedly held by this court, and seems to be well established, that the maker of a promissory note, notwithstanding the usual expression of consideration, such as "for value received," &c. may show as against the payee, or other person standing in the same situation, that the note was given without consideration, or that the consideration failed, &c. [3 Phil. Ev. 1458, *et seq.*] It is allowable then, for the defendant to show, that the writing adduced was made without any thing which the law will regard as sufficient legal inducement, or if there was a consideration that it has failed; in order to do this, he must be permitted to prove what occasioned the making of the writing. But we do not understand that the verbal evidence in this case was offered at the instance of the defendant, for the purpose of counter-vailing the statute of limitations.

If the paper imposed a legal duty, it is difficult to perceive upon what ground the parol evidence could affect the operation of the statute of limitations. Its effect, if operative as an undertaking to pay, was, to give to the party in whose favor it is made, a present right of action, without reference to the consideration on which it is founded. The evidence then was allowed to change the legal effect of the paper, and instead of treating it as a debt *in praesenti*, so interpolating it, as to make it, in the opinion of the circuit judge, a debt payable whenever the plaintiff chose to demand it. Is such testimony admissible? [See 3 Phil. Ev. C. & H.'s Notes, 1460-1, *et seq.*]

But conceding that the declarations of the defendant were allowed to go in evidence, were in themselves unobjectionable, and the question arises, whether the charge to the jury is not erroneous. It assumed, that if this were true, then the defendant was merely an agent for the plaintiff's testator, and

the statute of limitations did not begin to run against the note, until after payment of it was demanded. The charge proceeds upon the hypothesis, that, that although the note upon its face was due, "presently," as alledged in the declaration, yet in point of fact, it was not payable until demand—it assumes as a postulate, the validity of the note, and that it may be varied in its operation by parol evidence of a contemporaneous or precedent agreement, that it was to be payable at a time other than it imports. We have seen that it is competent for the maker of a note to prove its consideration, and that it has failed; and where the note is a nullity we suppose it is allowable for the payee to treat it as such, and declare in assumpsit in a form adapted to his proof. But we cannot conceive how it is possible, consistently with the rules of law, to maintain that a note is a valid security for money, and may be varied in its operation or effect by parol evidence of an agreement made previous to, or simultaneous with its execution. The law upon this point is explicit. [See Phil. Ev. C. & H's Notes, 1460, 1470.]

This view disposes of the only question raised upon the bill of exceptions. Whether, if the defendant was a mere agent, and acted in good faith in the performance of his duties, he can be charged in this action, is a point not presented. It follows from what has been said, that the ruling of the circuit court cannot be supported—its judgment is consequently reversed, and the cause remanded.

KYLE v. GRAY.

1. Where there is evidence of a conversion, by selling the property in controversy, proof of a demand and refusal is unnecessary, and the rule is the same, although in the first instance the property came lawfully to the defendant.

Writ of Error to the Circuit Court of Tuscaloosa.

TROVER, by Gray against Kyle, to recover damages for the conversion of a horse.

At the trial, it was proved that the horse was sold by the plaintiff to one Keziah, on the condition that the latter should pay \$40, part in iron and part in money. Keziah took the horse in possession under this contract, and paid \$18 in iron but the plaintiff reserved to himself a lien until the purchase money should be paid. Subsequently, the horse was returned to the plaintiff, and the contract rescinded—the plaintiff applying the \$18 previously paid, as a compensation for the hire of the horse. There was also evidence that Keziah was indebted at the time, as well as that the horse continued in his possession up to the time of the levy of an execution upon it, as his property, and from thence until it was sold by the constable. There was also evidence conducing to show, the plaintiff had made affidavit of his right to the horse, and that the constable had notice, but he pursued no other measures to assert his claim until the day of sale, at which time he gave public notice that the horse belonged to him, and not to Keziah—that the defendant was present, and heard what the plaintiff said—that he purchased the horse under this sale, and afterwards sold him for \$30.

This was all the evidence. On it the defendant's counsel requested the court to charge the jury, that if the horse went lawfully into the possession of the defendant, then it was necessary for the plaintiff to prove a demand and refusal before he could recover. This was refused, and the charge given, that if there was proof of conversion, then in this particular case, no demand was necessary.

The defendant excepted, and the ruling of the court is now assigned as error.

B. F. PORTER and BRODIE, for the plaintiff in error, insisted—

1. The charge of the court misled the jury, because it assumed the evidence proved a conversion. [Toulmin v. Lesesne, 2 Ala. R. 359.]

2. To sustain trover, there must be either an absolute property, with a right to immediate possession, or a special property and actual possession. Plaintiff having purchased at a legal sale, there should have been proof of conversion. [2 Greenl. Ev. § 636, 640; Gray v. Crocheron, 1 Porter, 191.]

HUNTINGTON and P. MARTIN, for the defendant in error, argued, that when an actual conversion is shown, a demand is unnecessary. [Tompkins v. Hart, 3 Wend. 406; Earle v. Van Buren, 2 Halst. 344; Newsum v. Newsum, 1 Leigh. 76; Jewett v. Partridge, 3 Farf. 243.]

GOLDTHWAITE, J.—There seems to us to be nothing in the ruling of the circuit court which could have misled the jury. The request, in the first instance, is made for instructions, that if the horse went lawfully into the defendant's possession, it was essential the plaintiff should prove a demand and refusal. The counsel do not seriously question the correctness of this refusal, nor indeed could they do so with effect, for a demand and refusal is only evidence of a conversion—not necessarily or in all cases a conversion by itself. After refusing the charge, the court proceeds to say, that if a conversion was proved in this particular case, then no demand was necessary. It is said, the facts do not establish the right of property in the plaintiff, and therefore there was no conversion. We do not well see what stronger evidence there could be of a conversion than the sale of the property, but whether this sale was a conversion, depended on the other question as to the right of property. This we must presume was left to the jury, and although we, in their station might possibly have come to a different conclusion, on the evidence stated, this is no ground to reverse the judgment, there being no error in the points of law on which the cause went to the jury.

Judgment affirmed.

WRIGHT v. McALEXANDER.

1. A contract, by which the use of slaves is allowed as a compensation for the interest of money, is not on its face usurious, but will be so, if intended as a shift, or device, to obtain unlawful interest.
2. Such a contract cannot afterwards be converted into a mortgage by the borrower, so as to require the lender to account for the hire of the slaves, if that exceeds the legal rate of interest.

Error to the Chancery Court of Huntsville.

THE bill was filed by the plaintiff in error, and alleges, that in the year 1837, having three slaves, a woman and two children, conveyed in trust to secure a debt to one Pruitt, and which were about being sold, the defendant in error advanced the sum for which the slaves were conveyed, and agreed to receive the services of the slaves as an equivalent for the use of the money. That thereupon, complainant executed an absolute bill of sale for the slaves to him, but with the distinct understanding that she should have the privilege of redeeming them when she could refund the money. Some short time afterwards, she put into the defendant's possession a negro girl, upon the same terms, and received an advance thereon of one hundred and twenty-five dollars. The prayer of the bill is, that the complainant be allowed to redeem, that an account be taken of the hire, &c.

The defendant, by his answer, denies the allegations of the bill, and sets up a title to the slaves.

The proof taken in the cause satisfied the chancellor of the truth of the allegations of the bill, and he directed an account, to ascertain the present value of the slaves; which being ascertained by the master, he farther directed, that if upon a tender made to the defendant of the sum advanced upon the slaves, they were not delivered to the complainant, an execution should issue for their value, as ascertained by

the master. He refused to order an account to ascertain the value of the hire of the slaves.

From this decree the complainant prosecutes this writ, and assigns for error the refusal of the chancellor to allow hire upon the slaves.

McCLUNG, for plaintiff in error.

No counsel appeared for the defendant in error.

ORMOND, J.—The objection made to the decree of the chancellor is, that the defendant should have been charged in the account with the difference between the value of the hire of the slaves, and the interest of the money advanced upon them.

The case made by the bill is, that the complainant agreed to allow the defendant the use of the slaves, as an equivalent for the interest of the money advanced by him. It is now contended, that this contract is usurious. We do not doubt, that if this shape was given to the contract, for the purpose of evading the statute of usury, it would be void, as no shift, device, or contrivance, will be available for that purpose the intention being to secure unlawful interest. But there is no such allegation in the bill, and in our opinion the contract as there set out, is not on its face usurious.

To constitute usury, there must be a certainty of receiving more for the use of money, than legal interest. If there is a hazard of losing, so that the lender may receive less than legal interest, or lose the principal, the contract is not *per se* usurious, but may be declared so, if the contract was a mere device to evade the statute. The law was thus declared in the great case of *Chesterfield v. Janson*, 1 Wilson, 286, argued before Lord Hardwicke, and all the Judges. That was the case of a man thirty years of age, borrowing £5,000 and executing his bond to pay the lender £10,000, within a month after the death of the Duchess of Marlborough, his grandmother, in case he survived her, she being at the time seventy-eight years of age. He survived the Duchess, and the court held the contract not to be usurious, but valid, upon the principles above stated. The case has been repeatedly recognized since, and is the established law at the present

day. [Darones v. Green, 12 Meeson & W. 489; Thorndike v. Green, 11 Pick. 184; Hall v. Haggart, 17 Wend. 280.]

The facts of this case bring it within the influence of these principle. The slaves were, most of them small children, and all were liable to sickness, and death; there was therefore a risk to be encountered, and a possibility of losing both principal and interest. We are aware that the Kentucky cases cited on the brief of the plaintiff in error, do not take this view of the law, but it is to be observed that in both the cases cited from 3 Bibb, 207, and 4 Bibb, 327, the facts were much stronger than in this case, to authorize the inference that the form of the contract was a mere disguise, to obtain usurious interest, and in both, the question of usury was made, for the purpose of avoiding the contract for that cause. What is said upon this question in the case of Hamer v. Harrell, 2 S. & P. 323, was not necessary to the decision of the case, and so admitted in the opinion of the court. It is not therefore entitled to the weight of an adjudged case.

In the case of a pure pledge, to which this contract bears more resemblance than any other, the law seems to be somewhat uncertain, as to the right of the pledgee to use the thing pledged, without accounting to the pledgor for the value of such use. In Coggs v. Bernard, Lord Holt, speaking of this species of bailment, says, if a horse be pawned, the pawnee may use the horse, if he be at charge in keeping him. [1 Bac. Ab. 379, Chancellor Kent, appears to think, he should apply the profits, if any are made, to the benefit of the pawnor. [2 Kent's Com. Lec. 40.] And see also the subject discussed by Mr. Justice Story, in his work on Bailments, c. 5, 220.] But however this may be, in the case of a pure pledge of a slave, for the payment of a debt, here there was a special contract, that the use of the slave should be a compensation for the use of the money. Where such a contract is entered into *bona fide*, and is not a pretext resorted to as a cover for usury, it appears to us, contrary to the first principles of justice, to permit the borrower to suffer the pawn to remain in the hands of the pawnee, until the use has not only extinguished the loan, but also brought the pawnee largely in debt, and then insist on considering it a mortgage. Although it is true the defendant could have terminated this

contract at any time by demanding his money, yet the complainant had the same right of regaining the possession of her property, by paying the sum borrowed, and until she elected to put an end to the contract, he had the right to consider it as still continuing. For these reasons, we think the chancellor did not err in refusing to allow hire for the slaves.

Let the decree be affirmed.

THOMPSON v. IVES.

1. It is allowable for the court to permit the landlord to defend instead of his tenant where the premises have been sold as the property of the latter, and where an action for the recovery of the possession has been brought by the purchaser; but the landlord when let in, cannot set up a title consistent with the possession sought to be recovered—he may however show his present right to retain it, and the superiority of his title.
2. Under our registry acts, the copy of a deed recorded pursuant to their directions, is not admissible evidence, without first satisfactorily accounting for the absence of the original.
3. *Semle*: Where both parties claim under distinct purchases made at sales under several executions against the same defendant, it cannot be presumed that either party is in possession of the title papers of the defendant in these executions, so as to make the mere failure of either to produce them on a notice by the other, sufficient to let in secondary evidence of their contents. But whether the notice was sufficient or not, no injury could result from the admission of such evidence, as the title of the defendant in the executions was conceded by both parties.

Writ of Error to the Circuit Court of Autauga.

THIS was an action of trespass to try titles to, and to recover damages for the detention of a tract of land particularly described in the indorsement on the writ and in the declaration. The plaintiff claimed as a purchaser of the lands in

question at a sheriff's sale under an execution against Eber N. Coe, the defendant in the writ and declaration; the defendant in error presented his affidavit declaring the lands were his property, and that Coe occupied the same as his tenant. Thereupon, on motion of the defendant, he was substituted as a defendant instead of Coe, notwithstanding the plaintiff objected.

The cause was tried upon the plea of *not guilty*, a verdict returned for the defendant, and judgment rendered accordingly. Upon the trial the plaintiff excepted to the ruling of the court. The plaintiff offered evidence tending to show that the lands sought to be recovered were in 1841 sold by the sheriff of Autauga under an execution against the estate of Norman Coe and Eber N. Coe, that the latter was at that time in possession, and so continued until after the commencement of this suit: *Further*, that he had given due notice to the defendant and his attorney to produce the deed of Jordan (the patentee of the lands) to Sewell, and the deed of Sewell to N. and E. N. Coe the defendants in the execution; upon the refusal of the defendant to produce these deeds, the plaintiff offered to read from the records the copies of these deeds duly registered, to which the defendant objected, because their absence was not sufficiently accounted for; and the court sustained the objection.

The defendant offered evidence tending to prove that the same lands were purchased by one Duncan in 1838 at a sale by the sheriff under sundry executions against N. and E. N. Coe, and conveyed to him by Duncan previous to the sale at which the plaintiff purchased. The plaintiff prayed the court to charge the jury, that in this action which was brought by the plaintiff, a purchaser at a sheriff's sale against Coe, a defendant in execution, an outstanding title in another could not be set up in defence. This charge was refused, and the jury were instructed that Ives having been made a defendant, may set up any legal title which he has.

The plaintiff further prayed the court to charge, that the substitution of Ives, as stated in the record, could not affect the plaintiff's right to recover, which was also refused, and the jury instructed that if Ives was the owner of the lands

and the landlord of Coe, and the latter was his tenant at will, sufferance, or for years, and having no other interest therein, then the plaintiff was not entitled to recover, unless he showed a better title than the defendant, Ives.

A. STERRETT and F. BUGBEE, for the plaintiff in error, insisted that Ives should not have been permitted to defend the action, and that the circuit court in its several decisions and rulings at the trial, misapprehended the law.

A purchaser at sheriff's sale of land, acquires only the title of defendant in execution. [Clay Dig. 205, § 17.] Coe had no interest in the land, which could pass by sheriff's deed.

S. P. STORRS, for the defendant in error, made the following points: 1. The landlord was at all times allowed to come in and defend with his tenant 2. Anciently, under a proper showing, the courts would permit the landlord to defend alone. 3. In Alabama, the landlord may be permitted to enter himself defendant in a suit against his tenant for land. [3 Burrows, 1294-5, 1301-2; Adams on Ejectment, 230; Stiles v. Jackson, 1 Wend. 316; Jackson v. Stiles, 4 Johnson, 493; 11 Ibid, 451, 483; 17 Ibid, 112; Davis v. McKinney, 5 Ala. 719; Clay's Digest, 321, § 49; see also statute of George II. and the statute of New York.] "Joining with defendant" in these, but not in the act of Assembly. Before secondary evidence can be admitted of a deed (upon notice given the opposite party to produce) it ought to be clearly proven that the deed is in the possession of such party. [1 Stark. Ev. 356; 1 Phillips' Ev. 440; Life Ins. Co. v. Mer. Ins. Co. 7 Wend. 34; Nicholson v. Hilliard, 1 N. Car. Law R. 592, 604; McKellep v. McIlhany, 4 Watt's, 318; Sommerville v. Stephenson, 3 Stewart, 271; Fryer v. Dennis, 2 Ala. 144; Lazarus v. Lewis, 5 Ala. 459; Smith v. Armstead, 7 Ala. 698.] A party claiming under deed of warranty, though presumed to possess the deed to himself, is not supposed to possess the title papers anterior to such deed. [Cocke v. Hunter, 2 Tenn. R. 113; Nicholson v. Hilliard, 1 N. Ca. Law R. 253-4; Jackson v. Woolsey, 11 Johnson, 453.] Plaintiff in ejectment must recover on the

strength of his own title. [3 Bur. 2587,] and all the law books. No other than legal title in land shall be sold by sheriff. [Clay's Dig. 216, § 76.]

COLLIER, C. J.—In *Doe ex dem. Davis v. McKinney and McKinney*, 5 Ala. 719, the first question raised upon the record was fully considered, as well independently of, as in reference to the third section of the act “for the relief of tenants in possession against dormant titles.” We there said that “the terms of this enactment are certainly broad enough, if literally interpreted, to extend to all cases, and it would really seem that no inconvenience would result from allowing it thus to operate. By making himself a defendant, the landlord cannot urge as a defence any matter which the law did not previously recognize as available to defeat a recovery by the plaintiff. The provision of the act cited does not affect the parties’ rights; it relates only to the remedy. As then it was not allowable for the defendant in an execution to defeat the purchaser by showing that he held under another, so, neither can the landlord when let in to defend, set up a title consistent with the possession sought to be recovered. It is immaterial to him whether the plaintiff recovers the possession or not; for as soon as he comes in, he will be liable to all the burthens and incur all the responsibilities which rested upon the defendant as a tenant. In fact, the recovery of the purchaser, so far as the landlord is concerned, effects nothing more than the substitution of one tenant for another.” It was added that if it was an error to permit the landlord to defend, it was one that could work harm to no one, and consequently was not fatal to the judgment.

The case cited very conclusively shows, that in the admission of Ives to defend the suit upon the ground that he was the landlord of Coe, there is no error for which the judgment is reversible. It may not be out of place to remark that, a landlord should be cautious in making himself a defendant in conjunction with, or instead of his tenant, where the latter holds under a lease for an unexpired term, lest upon a general verdict against him, he might be estopped from asserting his title at the expiration of the lease.

Under our registry act, it has been held that the copy of a

deed recorded pursuant to the directions is not admissible without first satisfactorily accounting for the absence of the original; that the register is itself but a copy, and cannot be read as evidence without showing why the higher proof is not produced. [3 Stew. Rep. 271; 5 Ala. Rep. 459.] These decisions were induced by the failure of the legislature to declare that a copy from the record should be evidence. In some of the States, the legislative acts upon the subject, either expressly or by implication, provide for the admission of copies, and the exposition they have received from their courts are of course different. [1 Conn. Rep. 387; 6 Ohio Rep. 32; 4 Bibb's Rep. 42. But see 6 H. & Johns. R. 141; 2 Penn. Rep. 617; 13 Mass. Rep. 472; 11 Wheat. Rep. 78; 1 Dev. & Bat. Rep. 40.]

If the defendant can be presumed to be in possession of all the deeds by which the lands in question had been conveyed from the patentee to N. and E. N. Coe, then the notice to produce them would warrant the admission of secondary proof of their contents. But can it be intended that the vendee of lands has the possession of any other deeds by which it may have been conveyed by previous proprietors than that under which he claims? However this may be, in a case like the present, where both parties claim under purchases at sheriff's sales in virtue of executions against the same defendants, can it be intended that the latter have delivered over the evidences of the title they once claimed? And if so, to which of the parties? Whatever answer the first question may receive, it is certainly more difficult to answer the second or the third.

In *Tillery v. Simmons*, 1 Overt. Rep. 209, it was held that a purchaser of land at a sheriff's sale is not bound to produce the original grant. So one who has bought land with a general warranty, or a purchaser at a sheriff's sale, it has been decided is not presumed to have the custody of any other deed than that from his immediate bargainor. [2 Murp. R. 270.]

If the deeds which the defendant was called on to produce cannot be intended to be in his possession, the notice to him and a failure to comply cannot justify the admission of secondary evidence of their contents: and if they were held by

some third person not a party to the suit, within the jurisdiction of the court, their production should have been coerced by a *subpœna duces tecum*, if compellable, under the circumstances.

But, has the plaintiff been prejudiced by the exclusion of the copies? He proved the possession of the Coes at the time of his purchase, and this, *prima facie*, in connection with his deed from the sheriff, &c. entitled him to recover; the defendant then showed that he was also a purchaser under a previous execution against the same parties, and that E. N. Coe was their tenant. The title of the Coes, as contended for by the plaintiffs, was conceded by the defendants, and the pretensions of the parties to success in the action made to depend upon the superiority of their respective titles acquired under the sheriffs' sales. This view shows that no injury has resulted to the plaintiff from the rejection of his secondary evidence.

There was no effort on the part of the defendant to set up an outstanding title in a third person, but he merely attempted to show the superiority of his own title, and that E. N. Coe was his tenant; the charge asked was then properly refused.

If Ives was properly admitted to defend instead of his tenant, it was certainly competent for him to show that he had the superior legal title. By this we do not understand that he might merely prove that he had a fee simple or less estate, but also that he must prove a present right to the possession, by the determination of the tenancy or from some other cause. In this view of the case, there is no error in the refusal to give the second charge prayed, and in the instructions given. It follows from what has been said, that the judgment of the circuit court must be affirmed.

MOORE v. HANCOCK.

1. *Quere?* Whether any individual can make himself a party against those asking the action of the commissioners of roads and revenue, in the matter of a public road. Also—whether even a *certiorari* can be sued out to set aside, or quash an order of this public nature, except in the name of the State *ex relatione*.
2. No individual has the right to intervene in the court of commissioners of roads and revenue, and put questions on the record by bills of exception, in the matter of a public road.
3. An order to change a public road is regular, if the order shows what change is directed to be made—if a jury consisting of the proper number of persons is appointed to view the proposed change, and their return conforms to the statute—and after this a second jury is appointed to lay off and mark the proposed alteration.

Writ of Error to the Circuit Court of Madison.

These proceedings originated in the court of the commissioners of roads and revenue for Madison county, in which Hancock petitioned to change the road known as Wade and Powell's. The court acted on the petition, and made an order to change the road. Afterwards, Moore prayed a *certiorari* from the circuit court to remove this order to that court, and quash the same; alledging an interest in the matter determined, and asserting that the notice prescribed by law was not proved, unless the testimony of Hancock, the only petitioner, was sufficient for that purpose; and that one Willburn, sworn as one of the jury, to lay off the road, &c. was not a householder. The petition for *certiorari* also asserts, that an overseer of the road has made no report accepting the road as changed, and that the court of commissioners of roads and revenue refused to allow the contesting party to appeal from the order.

A *fiat* was awarded by the circuit judge, and a transcript of the proceedings of the court of commissioners of roads and revenue, certified to the circuit court.

From this it appears, that at the term of that court held in July, 1844, the petition of Hancock was presented, asking a change in the road named, in a manner therein described, "and it appearing to the satisfaction of the court that legal notice had been given," it was ordered that certain persons then named should be a jury to examine into the propriety of changing the road as asked by the petition, and that these persons should make report thereof to the next term of the court.

At the October term of the court, an order was made in these terms: "The jury heretofore appointed on the petition of R. Hancock, for a change of Wade and Powell's road, from, &c. having made a favorable report thereon, it is ordered, that certain persons who are therein named, householders of the said county, be appointed a jury to mark out the road accordingly, and that they make report thereof to the next term of the court."

At the January term, 1845, an order was made, which recites that a majority of the jury formerly appointed, having made a favorable report of the change of the road, and directs that the road be changed in a manner then stated, and which is the same prayed for.

It further appears, from a bill of exceptions allowed at the hearing of the petition, that Moore appeared to contest said petition, on the ground of owning lands contiguous to the road. He objected that the necessary publications by advertisement were never made. Hancock, the petitioner, was permitted, by his own oath, to show the identity of one or more of the advertisements.

When the jury of view made their report, Moore appeared and objected, that one of them was not a householder. Whether the fact was established does not appear.

When the order establishing the change of the road was made, Moore prayed an appeal, which the court refused to allow.

The transcript also contains the several processes issued to the juries, as well as their returns and reports to the court.

In the circuit court, Moore assigned that the court of commissioners erred—

1. Because there was no sufficient proof of notice to establish the change.

2. Because Willburn, one of the jury, was not a householder.

3. Because certain proof as to notice was allowed after the order for the first jury.

4. Because the oath prescribed by statute for jurors, was not administered.

5. Because the appeal was refused.

6. Because there was no petition.

The circuit court affirmed the judgment, and this is here assigned as error.

S. D. J. MOORE, for the plaintiff in error, cited Dig. 507, § 4, 5, 6; Blann v. Grant, 6 Ala. Rep. 110; Samuels v. Farley, 7 Ib. 635; Commonwealth v. Coombs, 2 Mass. 489; Lester v. Vivian, 8 Porter, 375.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. The statutes prescribing the course to be pursued in establishing or changing public roads, have provided no mode by which the orders of the commissioners of roads and revenue of the several counties may be reviewed, and none has yet with us been settled by decision. These are matters of public concern, in which it can rarely happen that private interest is involved beyond the value of the land over which the road passes, and it is possible it is in this connection alone that individuals have any right to re-examine the decisions of that body to which this duty is intrusted.

In Hill v. Bridges, 6 Porter, 197, we held a writ of error would not lie to revise the refusal to lay out a road; and then remarked that as the discretion is reposed in the commissioners over roads, it is difficult to perceive for what reasons it could be supposed that this or any other court is invested with power to revise their judgment. We are not aware of any decision which warrants the conclusion that the action of county commissioners can be reviewed when its subject is a public road; nor can we think the legislature intended to

connect this matter with the ordinary litigation. It is true, in *Smith v. Com'rs of Lauderdale County*, 1 Stewart, 183, this court disposed of such a cause on the ground that the *certiorari* was sued for prematurely; but that was sufficient to dispose of the case as then presented, and nothing is said by the court to induce the idea that a revision of the order would have been made under other circumstances. Orders of the commissioners in relation to ferries and private roads frequently involve the rights of individuals, and therefore stand on a different ground, yet even as to these, no special mode of revision is appointed. [*Ex parte Tarleton*, 2 Ala. Rep. 35; *State, ex rel. v. Comm'rs of Talladega*, 3 Porter, 412.]

The exercise of this jurisdiction by the commissioners of the several counties being a matter of public concern, we should be disposed to doubt the right of any individual to make himself a party against those asking the action of the commissioners; and we incline also to think that if a *certiorari* can be sued out to set aside or quash an order of this public nature it can only be in the name of the State, upon the relation of some individual showing a direct proprietary interest injuriously and illegally affected by the order. [See *Commonwealth v. Coombs*, 2 Mass. 487.]

2. It is unnecessary, however, to make a decision to the extent of our *queries*, as this case can be otherwise disposed of; but what we have said is sufficient to indicate our opinion, that no one has the right to intervene in the primary court, and put questions on the record by bills of exception. The statute authorizing bills of exception gives the privilege only to *parties* to a suit and in the trial of a *cause*—[Digest, 307, § 5]—terms which evidently do not include a person in the condition of the actor in this *certiorari*. We may therefore dispense with the examination of the errors supposed to be placed on the record by that made.

3. There remains, then, only the form of the proceedings to be looked at, and these, in our judgment, are quite regular. If we concede that on a proper relation we could look at the judgment or order so far as to quash it if irregular, as seems to be the doctrine in Massachusetts. [*Commonwealth v. Coombs, supra*,] then here, we must infer that all the

pre-requisites to give jurisdiction have been complied with. The order sets out that legal notice was given of the application, and is precise in declaring what change shall be made—a jury of the proper number is appointed to view the proposed change, and this jury seems to have performed its duty in every particular—after the report of this jury, another is appointed to lay off and mark the proposed alteration, and on the coming in of their report the final order is made. This is entirely regular, and in strict conformity to the statute. [Digest, 507, § 3, 4, 5.]

There is no error in the record. Judgment affirmed.

LOCKE v. NOLAND & NOLAND.

1. A husband and wife, releasing to their children all their interest in the estate of the father of the wife, are not thereby rendered competent witnesses, in a contest upon the validity of the will of the wife's father.

Error to the Orphans' Court of Pickens.

THE defendants in error produced a paper, which they alleged to be the last will of Philip Noland, which they petitioned the court to admit to probate.

This was contested by the plaintiff in error, and an issue being made, and submitted to a jury, they found in favor of the petitioners, and thereupon the will was admitted to probate.

Pending the trial before the jury, the contestants offered in evidence, the deposition of Mary Harben, a married daughter of the testator, and one of the legatees in the will, who previous to being sworn, together with her husband, executed the following instrument :

“ Know all men by these presents, that we, Newton Har-

ben, and Mary his wife, for and in consideration of the love and affection which we have and bear to our children, Juliana Holland, Malvina Cowsent, and Alfred Harben, and also in consideration of the sum of one dollar to us in had paid, have, and do by these presents assign, release, and forever quit claim, unto the aforesaid Juliana, Malvina, and Alfred, all our right, title, and interest, in and to the estate of Philip Noland, deceased, to which we are, or may be entitled as heirs and distributees, in right of the said Mary, wife of the said Newton Harben, daughter of the said Philip Noland, deceased. In testimony whereof, we have hereunto set our hands and seals, 2 November, 1846.

NEWTON HARBEN, [seal.]

MARY HARBEN, [seal.]”

This deposition was rejected, on the motion of the petitioners, upon the ground that the witness was incompetent, and for the same reason rejected the testimony of Newton Harben, who was offered as a witness. To this the contestant excepted, and now assigns as error.

LINCOLN CLARK, for the plaintiff in error, makes the following points:

The release executed by Newton Harben and Mary Harben was sufficient to make them competent witnesses.

In this case the plaintiff in error contested the will offered by the defendants. The wife of Newton Harben was the daughter of the testator: it will be seen that their release is broad, including their entire interest both in the real and personal estate, and that it was executed and delivered before either of the witnesses were sworn.

In proof of the point made, see the following authorities: [Greenleaf on Ev.; 1 Phillips on Ev. 133; 2 Ibid, 269, note 268; Ibid, 264, note 259; Ibid, 265.]

If upon the assignment of one's interest he is competent to establish a will in which he is a legatee, why not to prevent its establishment when he is alike free from interest?

The case of Powell v. Powell, 7 Ala. R. as also the case of Murray v. Mason, 8 Porter, 201, were quoted and relied upon in the orphans' court. The first case is referred by the court to the second, and merged it. There the witness released

only his interest in that suit. In this, the assignment is without qualification or limit. But the objection which went to the exclusion of the witness was founded upon the idea of champerty and maintenance; and so is the case of *Bell v. Smith*, quoted by the court and commented on at length in their opinion in the case of *Murray v. Mason*. But in this case the plaintiff in error, who was the contestant, could not be guilty of champerty and maintenance because he occupied the place of a defendant. Nothing will be taken by intendment in favor of a will: before those who claim to be executors offer it, they must notify by citation the next of kin to appear and show cause against it if any they have—this is in the nature of process; it shows the position of the parties, and that the contestant is defendant. Now it never was heard that a defendant could be guilty of champerty and maintenance—he who moves suits is guilty of the offence, not he who defends them.

No question relative to costs can arise to prejudice the legality of the evidence, for the contestant, if he fails, is alone liable for costs.

SMITH, for the defendants in error:

1. In a case of this kind the court is entitled to be satisfied that the steps taken render a witness competent, are in good faith and not merely colorable. [*Steel v. Phœnix Ins. Co.* 3 Binne Rep. 313-16-17.] This pretended assignment is suspicious on its face.

2. A party to the record cannot be made competent as a witness, by releasing his interest and being indemnified against costs. [*Stone v. Bibb*, 2 Ala. R. N. S. 100.] Harben and his wife being anxious to set aside the will, (as appears in the deposition) were in fact as truly contestants as if their names had been on the record as such.

3. If this release or assignment could not be enforced against the witnesses, if they choose to avoid it, it does not make them competent. It is void as to the wife of Harben because it would, if valid, transfer her interest in her father's lands; and is not acknowledged by her, as *femes covert* are required to acknowledge any deed for their interest in lands, &c. [Clay's Dig. 151, 152, 155, § 1, 2, 27.]

4. The transfer is void. [9 Porter, 126.] It is an attempt to convey an interest in land, when the grantors are not even constructively in possession, and is therefore void. [Dexter and Allen v. Nelson, 6 Ala. Rep. N. S. 68.] It is a mere quit claim to an imperfect title to lands, and would therefore be void as against the legal title afterwards acquired by the witnesses.

5. A residuary legatee is an incompetent witness in a suit, the result of which may augment or diminish the fund in which he may participate. [Jones v. Scott, 2 Ala. Rep. N. S. 58.]

6. In regard to the interest of the witnesses in the personal property of the testator, it is a mere *chose in action*, and could not be recovered in the names of the transferees; therefore in a subsequent action, the witnesses would necessarily be plaintiffs of record, and are consequently still interested and incompetent. [Goodwyn v. Lloyd, 8 Porter, 237.] The transferor of a *chose in action* is not a competent witness to sustain an action to recover it, and it seems a release would not restore his competency. [Goodwin v. Harrison, 6 Ala. Rep. 438; Houston, Adm'r, v. Prewett, 8 Ibid, 846; Murray's Adm'r v. Mason, Adm'r, 8 Porter, 211, 32; Williams, Ex'r, v. Temple, 6 Ala. Rep. 656.]

7. One co-legatee cannot make herself a competent witness to increase the distributive sum of her co-legatees, by releasing to them her interest in the legacy; and her deposition under such circumstances may properly be suppressed. [Powell, et al. v. Powell, Adm'r, 7 Ala. Rep. 582.]

8. The witnesses do not refuse to accept their interest in the testator's estate, but, in legal effect, do accept it, and offer to give it or sell it to their children, so that in legal contemplation they would, as to future liabilities, be considered as having received their share as distributees if the will should be set aside, and in that view they would be liable to contribute to pay debts which might afterwards be established against the testator's estate. They cannot therefore release themselves from liability in this way, and are incompetent.

9. The witnesses have not attempted to transfer their interest as legatees, but only as distributees, so that if the will be established, they could say they had not assigned their inter-

est under the will as legatees; and after failing in their efforts to set aside the will, could evade their quit claim as distributees, and take as legatees. They are therefore incompetent.

ORMOND, J.—This is an attempt on the part of the witnesses, to establish by their own testimony, a right transferred by them, to their own children, to a distributive share of their grand-father's estate, which right is derived from them; the release, as it is called, being nothing less than a transfer of all the interest of Mrs. Harben in her father's estate. This is the precise point decided in *Powell v. Powell*, 7 Ala. 584, and is also within the influence of other decisions of this court, which hold that it is contrary to public policy, to permit a witness to establish by his own testimony, a claim derived from himself. [*Houston v. Prewit*, 8 Ala. 846; *Goodwin v. Harrison*, 6 Ala. 438.]

We have not thought it necessary to inquire whether, as contended, this conveyance is not sufficient to convey the interest of Mrs. Harben and her husband in her father's estate. Conceding it to be so, it is most manifest, they are really as deeply interested, as if they were contestants upon the record. If the transfer were to a stranger, and for a valuable consideration, they would not be competent witnesses to establish the claim derived from themselves; still less can they be so in this case, where the transfer is to their own children, and without consideration. In such a case, whatever may have been the motive, in estimation of law, it is merely colorable.

The witnesses being properly rejected, the judgment of the court must be affirmed.

BISHOP'S HEIRS v. HAMPTON.

1. A posthumous child may claim by descent as an heir of its father, and may join with its elder brothers and sisters, in an action for the recovery of the possession of the lands descended.

Writ of Error to the Circuit Court of St. Clair.

THIS was an action of trespass to try titles, &c. to certain tracts of land, particularly described in the indorsement on the writ and in the declaration. The defendant demurred to the declaration, his demurrer was overruled, and thereupon the cause was submitted to the jury, upon an issue which, by consent, allowed the admission of all evidence, material to either party—a verdict was returned for the defendant, and judgment was rendered accordingly. From a bill of exceptions, sealed at the plaintiff's instance, it appears that the plaintiffs, excepting Jeffrey H. Richardson, the husband of one of them, were the children of Harris G. Bishop, deceased, by his lawful wives, who died before the institution of this suit. One of the plaintiff's witnesses stated on cross-examination, that he believed that the youngest of the plaintiffs was born after the death of his ancestor, but on re-examination stated, that it was possible he was a posthumous child; that he knew nothing certainly about the time of his birth. The plaintiff moved to exclude this evidence, but the court overruled the objection, and permitted it to go to the jury. Upon this testimony the court charged the jury, that if the youngest plaintiff was born after the death of his father, then there was a misjoinder of plaintiffs, and they cannot recover in this action, that the right to sue in this action is confined only to such of the children of the deceased ancestor, as were born at the time of his death. To this charge the plaintiff excepted.

After the jury had retired from the bar, and deliberated for several hours, they returned into court for instructions, when the charge above stated was repeated. Thereupon the plain-

tiffs prayed that other instructions, specially set out in the bill of exceptions, might be given to the jury; but this prayer was denied—the court not believing it proper at that time to give additional charges for either party. The plaintiff again excepted.

Previous to the withdrawal of the jury from the court, the plaintiffs prayed the court to charge the jury, that the evidence of the witness, who testified as to the birth of the youngest child, was not of itself sufficient to prove that he was born after the death of the ancestor. This charge was also denied, and the plaintiffs excepted.

M. J. TURNLEY, for the plaintiff in error, cited 2 Bl. Com. 201, 446; 2 Kent's Com. 408; Clay's Dig. 168, 191.

S. F. RICE, for the defendant in error, cited 3 Ala. Rep. 679, 747; 5 Porter's Rep. 270; 9 Id. 195; 9 Ala. Rep. 791, 861, 965; 1 Salk. Rep. 227; 1 Freem. Rep. 244; 2 Vern. R. 710; 2 Atk. R. 117; 3 Wils. R. 526.

COLLIER, C. J.—The declaration, as well as bill of exceptions, affirm that the plaintiffs claim the land in controversy, as the heirs at law of Harris G. Bishop, deceased; and the bill of exceptions describes them as his children, by wives who died before the commencement of the suit. This is quite sufficient to show, that the plaintiffs claim as heirs of their father, and is an answer to the supposition of the defendant's counsel, that the land may have been the estate of the first wife, and she the mother of all the children but the youngest; and that if this were so, (as might be intended against the party excepting,) no injury has resulted from the ruling of the court.

An infant in *ventre sa mere* is supposed in law to be born for many purposes. It is said to be capable of having a legacy, or a surrender of a copy-hold estate made to it—to have a guardian assigned to it—to take by descent, and to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. But in the case of descent, the presumptive heir may enter and receive the profits for his own use until the birth of the child. [1

Steph. Com. 129, 130, and citations in the notes. See also; 4 Dane's Ab. 540, 545, 553; Clay's Dig. 597, § 6.] The law has been so long and so satisfactorily settled, that it is needless to extend this opinion, by adding to the authorities referred to. It is perfectly clear, that the circuit court misapprehended the law, in charging the jury that the posthumous child, if indeed one of the plaintiffs was born after the death of the ancestor, could not join with its brothers and sisters in an action for the recovery of the lands descended. In respect to the ruling upon the other points, no question can arise upon a future trial, and we therefore decline their consideration. Let the judgment be reversed and the cause remanded.

GILDER v. JETER.

1. A usurious contract with the principal debtor, to give day of payment, will not discharge the surety, although the delay is actually given in pursuance of the contract.

Error to the Circuit Court of Chambers.

ASSUMPSIT, by Jeter against Gilder, on a promissory note made by him and McHenry & Co. dated 1st June, 1838, and payable on the 1st January, 1839.

At the trial, there was evidence conducing to show, that McHenry & Co. were the principal debtors, and Gilder their surety. After the note fell due, McHenry & Co. gave the plaintiff their promissory note for an additional eight per cent. on the amount due on the note, as an inducement to him to wait with them another year, and for this the plaintiff thereupon agreed to wait with them another year, and did so wait. There was no proof that Gilder assented to this indulgence,

or even that he knew of the arrangement. There was no other consideration for the promissory note last given, than the delay of payment on the other, that in the mean time drawing lawful interest. The proof also conduced to shew, the McHenrys at the maturity of the first note, had much property, and were then solvent, but became insolvent before the expiration of the year.

On this state of proof the court charged the jury, that the giving of a note under the circumstances disclosed, was not in law a valuable consideration, and if the plaintiff on such consideration promised to indulge McHenry & Co., and had indulged them, without the knowledge of Gilder, the surety, then such promise and indulgence would not discharge him from liability on the note.

The defendant excepted to this charge, and now assigns it as error.

ROBINSON and REESE, for the plaintiff in error, insisted—

1. That the contract to pay usurious interest, although not binding on the promisor, should be considered as valid against the other party. Such is the rule when a contract is made with an infant. [Bingham on Infancy, 9.]. At any rate the contract was valid until disaffirmed by the promisors, and therefore is so to discharge the surety. [Cook v. Dyer, 3 Ala. R. 643.]

2. The contract to give day, although founded on a void or illusory consideration, will, if the delay is given, discharge the surety. [King v. Baldwin, 2 Johnson's Chancery, 559; Reese v. Barrington, 2 Vesey, 540; Ludlow v. Simons, 2 Caines Cases, 1; 18 Vesey, 20; Kirby, 379.]

3. When time is given, or any alteration made in the contract, the surety is discharged. [Ellis v. Bibb, 2 Stew. 63; Inge v. Bank at Mobile, 8 Porter, 108; Comegys v. Booth, 3 Stewart, 14; McKay v. Dodge, 5 Ala. Rep. 388.] And a different doctrine applied to this case, would enable the usurer to take advantage of his own wrong, without pretence that the other and injured party, was not willing to abide the contract. [Cook v. Dyer, 3 Ala. Rep. 643.]

S. F. Rice, for the defendant in error, insisted, that a usurious contract for indulgence is wholly void, and does not discharge a surety. [Wilson v. Langford, 5 Humph. 320.] Neither will a gratuitous promise to indulge the principal discharge the surety. [Pope v. Martin, 6 Ala. Rep. 532; Agee v. Steele, 8 Ib. 948; Wilson v. Bank of Orleans, 9 Ib. 847; Armstead v. Thomas, Ib. 586; Shipping v. Eastwood, Ib. 198.]

GOLDTHWAITE, J.—There is no question at this day, that the giving of time to the principal debtor, has the effect to discharge the surety, and there are many cases in our own court on this subject. But in all cases of this nature, the time so given must be by a contract which is binding, and it is on this ground, that an agreement without consideration, is said not to produce this effect. In *Philpot v. Brant*, 4 Bing. 717, an executrix promised the holder of the bill, of which her testator was the acceptor, if he would let the matter stand over, she would engage to pay it out of her private income. The holder agreed he would wait a reasonable time if the interest was paid, and in pursuance of this agreement, interest was paid out of the private income of the executrix. This was held not to discharge the subsequent parties on the bill for the reason that the promise by the executrix, to pay the bill out of her own estate, was void, by the statute of frauds. The reason on which the surety is discharged by the giving of day to the principal, is, that his hands are tied up in regard to the principal debtor, and as the surety has the right to proceed immediately upon paying the debt, this right is gone by the giving of day. [Pitman on P. & S.]

It is evident that no other than a legal contract can produce this effect, and therefore, if the plaintiff in this case had sued the principal debtor, before the expiration of the year, the latter could not be permitted to invoke the usurious contract to delay the suit; and as he could not claim delay under it, so neither can his surety urge, that it prevented him from paying and immediately suing. The analogy supposed to exist between this contract and one made with an infant, fails, for the reason that the contract with the infant is voidable only, and not void or illegal. Nor can the party

have aid from the principle settled in *Cook v. Dyer*, 3 Ala. Rep. 643, as here, he is obliged to set up the usurious contract as valid, before his right can be established.

Independent of the reasoning on which we think the charge of the circuit judge sustained the decision, *Wilson v. Langford*, 5 Hump. 320, is precisely in point, as is also *Kyle v. Bostick*, 10 Ala. Rep. 589.]

We have only to add, that the judgment is affirmed.

CAMERON, EX'R, v. CLARKE, SMITH & CO.

1. An affidavit to suppress a deposition, because the party attended within the time, but after the deposition was taken, is insufficient, if it does not also state, that he has been injured by his inability to cross-examine the witness.
2. A deposition may be taken at any time, within the time designated in the notice.
3. A plea by an administrator, that the estate has been declared insolvent, is bad, unless it discloses, that the report of insolvency was made by him, and that he still continues the representative of the estate.
4. An attorney who had a note for collection, and received payment in slaves, may be sued on a parol promise to pay his principal, it not being within the statute of frauds.
5. An action for money had and received, may be maintained if the principal elects to consider it a payment.
6. Where an attorney charges himself with an amount collected for his principal, and charges the principal with his fee, the jury may infer a promise from the attorney, to pay the balance,

Error to the Circuit Court of Pickens.

ASSUMPSIT by the defendant, against the plaintiff in error. The declaration alledges, that the testator of defendant, was indebted to the plaintiff, in his lifetime, in the sum of \$832, for money had and received before that time by him, for the

plaintiff's use, and being so indebted, undertook, and promised, &c., and concluding with the common breach, without alledging any promise by the executor.

The defendant pleaded—1. Non-assumpsit. 2. The statute of non-claim; and 3, That since the commencement of the suit, to wit, on the 2d Monday of April, 1846, at a regular term, of the orphans' court of Pickens county, having jurisdiction of the premises, of the estate of the said John M. Cameron, was by the action and decree of said court, according to the act of 1843, in such case made and provided, duly declared insolvent, and this the said defendant is ready to verify. Wherefore he prays the court, that if the issues joined on his other pleas in this behalf above pleaded, be found against him, then the judgment of the court be according to the act aforesaid.

To which the plaintiff replied, that as to the decree of said orphans' court, declaring the estate of the said John M. Cameron insolvent, as in said plea mentioned, say, *precludi non*, &c. because they say, that the estate of the said Cameron, was not declared insolvent at any time while the defendant acted as executor as aforesaid, of the estate of the said J. M. Cameron, but after he had resigned his trust as such executor, and that the decree of the orphans' court aforesaid was made at a time when another, and a different individual than this defendant, was acting as the administrator *de bonis non cum testamento annexo* of the said John M. Cameron, deceased, and this he is ready to verify, &c.

To this replication the defendant demurred, which was overruled by the court.

Upon the trial of the cause, as appears from a bill of exceptions, the plaintiff offered to read the deposition of a witness, which was taken pursuant to a notice, that it would be taken at a particular place, and between the hours of 8 o'clock and 4 o'clock of a certain day, which the plaintiff moved to suppress, and made affidavit that he attended at the middle of the day set forth in the notice, and was informed that the deposition was taken, and the witness had left town, whereby he was prevented from cross-examining him.

The court refused to suppress the deposition, by which the plaintiff proved, that the witness called on defendant's testa-

tor, some time in January, 1844, as the agent of the plaintiffs, for payment of the debt in question. That the defendant exhibited the cash book of the deceased, upon which there was to the credit of the plaintiffs, \$860 31, collected from Gallatin Young, and a charge on the same book against the plaintiffs of \$43 30, commissions for collecting the debt. That defendant promised to pay the debt by a draft on Mobile, and subsequently, that he would pay the debt, if he was compelled to sell slaves of the estate to do so.

The plaintiff also proved by another witness, that defendants testator informed him, that he had received from plaintiffs the note on Young for collection, as an attorney at law. That Young had proposed selling him some negroes, which he was anxious to buy, and that Young had agreed that he might settle for them, by becoming paymaster to the plaintiffs on the note aforesaid. There was no proof that the plaintiffs were privy to this understanding, between Young and the deceased.

The defendant moved the court to charge, that if the jury believed from the evidence, that Young sold negroes to defendant's testator, and that he, in consideration thereof, promised Young to pay his debt to plaintiffs, the promise was not valid except made in writing.

2. That if defendant's testator, as an attorney at law, settled the claim with Young, by taking negroes in payment, without the instructions of the plaintiffs, he could not be made liable to plaintiffs, in an action for money had and received.

3. That the promises and admissions of the defendant, were not evidence to charge the estate of defendant's testator. The court refused to give these charges, and charged the jury, that if they believed from the evidence, that the defendant's testator had collected the note as an attorney, whether it was collected in money or property, his estate was liable for it. That although the promise of the defendant might not bind the estate of his testator, yet if the jury believed that he received in his lifetime, the money or its equivalent, they might regard the promise as evidence of the validity of the claim, he having the possession of his books, and the means of knowing the liabilities of the estate.

To all which the defendant excepted. These matters are now assigned as error.

HUNTINGTON, for the plaintiff in error.

PORTER, contra.

ORMOND, J.—The affidavit of the defendant, made to obtain a suppression of the deposition, was insufficient, as it did not disclose that any injury was sustained by his being deprived of the power to cross-examine. It should have set forth, that if an opportunity for cross-examination had been afforded, he could have proved certain facts material to him, which had been omitted, otherwise there is no motive whatever for retaking the deposition. But independent of these considerations, we think the plaintiff had the right to take the deposition at any time, between the two points of time designated. If this is not so, what is the proper time for commencing it, short of the last moment designated, so as to conclude it within the proper time? We can see no difference between this case, and the usual notice that it will be taken on a particular day, when the party has the entire day to take it in; and it is the duty of the opposite party to attend the whole business part of the day, until the deposition is taken.

When an administrator resigns his trust, and shows that he has fully administered the assets which have come to his hands, or that he has turned them over to his successor, a suit cannot be further prosecuted against him. But when an administrator pleads, or suggests, that the estate has been reported insolvent, as the effect is, that no judgment can be obtained against him as the representative of the estate, it follows necessarily, that such a plea is bad, unless it also shows that the report of insolvency was made by him, and that he is still the representative of the estate. If this were not so, it might happen, that an administrator might waste the assets, and still prevent any judgment from being obtained against him, his own conduct having superinduced the necessity on the part of his successor, of declaring the estate insolvent. The demurrer, therefore, to the replication, which disclosed the fact, that the estate was not declared in-

solvent by the defendant, but by his successor in the administration, was correctly overruled.

The charges moved for were properly refused. The first supposes, that the contract on the part of the defendant's testator was void, unless in writing, being as contended, a promise to pay the debt of another. The facts are, that the deceased, as an attorney at law, had received from the plaintiff, a note for collection, on one Young, which he settled with Young, by purchasing from him some slaves, and agreeing to pay the plaintiffs Young's debt. This is not such a promise as is required by the statute of frauds to be in writing. Here was a full consideration moving from Young, to the deceased, and a parol promise to pay Young's debt to the plaintiffs was sufficient. The case of *McKenzie v. Jackson*, 4 Ala. 230, is expressly in point.

The second charge proceeds upon the idea, that the action for money had and received, could not be maintained, unless the deceased received the amount due from Young in money. This proposition is equally untenable with the last. Having received from Young the slaves in lieu of money, he cannot controvert it, if the plaintiffs elect to consider it a payment to him of the note in his hands, for collection. [*Stewart v. Conner*, 9 Ala. Rep. 803.]

The third charge brings up the legal effect of the testimony of the witness, Osgood. He proves, that as the agent of the plaintiffs, he called on the defendant for payment, who exhibited to him the books of the deceased, from which it appeared that he had credited the plaintiffs in his cash book, with the money received from Young, and had charged them with the commissions, as an attorney at law, for collecting the debt. This testimony certainly authorized, if it did not require the jury to infer a promise from him to them to pay the amount so collected. Nor is there any thing in the testimony of the other witness, adverse to this inference. We are clear in the opinion, that there is no error in the record and that the judgment must be affirmed.

SELLERS, GUARDIAN, &C. v. SMITH.

1. Where an administrator has paid to the guardian of a distributee of the intestate's estate, an amount of money beyond the distributive share, the former, although he has made a final settlement of his accounts with the orphans' court, may maintain an action in his own name against the guardian for the excess paid him; and the latter may retain from the funds of the ward, for his reimbursement—the orphans' court not being authorized to allow the administrator a credit for the overpayment, he is personally chargeable with it: and may therefore recover it back.
2. The distinction in a judgment against a guardian, that it be levied of the goods and chattels, &c. of the ward in his hands, &c., is a mere clerical misprision, amendable on motion in the primary court, or in the supreme court at the costs of the plaintiff in error.

Writ of Error to the County Court of Lowndes.

T. J. JUDGE, for the plaintiff in error.

N. Cook, for the defendant in error.

COLLIER, C. J.—This cause originated before a justice of the peace at the suit of the defendant in error, and was removed by appeal to the county court. The amount in controversy being less than twenty dollars, the proof was addressed to the court, and judgment rendered in favor of the plaintiff below for \$15 36. It was proved that the plaintiff had paid to the defendant that amount for the benefit of his ward, over and above what was due to the ward from an estate of which he was an heir and distributee, and the plaintiff, the administrator. The plaintiff had made a final settlement of his administration, and hence it was contended that he could not maintain the suit to recover back the sum overpaid by him; but the court overruled this objection.

The defendant is described in the proceedings as guardian of Joseph Sellers; it must therefore be inferred that his guardianship is continuing, and that he still has the custody of the person and estate of his ward. The money which he

received from the plaintiff, must then, be understood to be in his hands, or under his control, so that if he is compelled to refund it, he may reimburse himself from the money of the ward, which he may have on hand, and the orphans' court would allow it on settlement. The question then is, has the plaintiff a right to recover. Ordinarily, it may perhaps be conceded, that a guardian is not liable to an action upon an implied promise. [See 11 Sergt. & R. Rep. 317; 6 Verm. Rep. 54; 5 Mass. Rep. 300; 6 Id. 58; 13 Id. 237; 1 Pick. Rep. 314; 1 Bailey's Rep. 344, 419.] And if it appeared that the defendant's trust was at an end, and the money of the ward paid over, or that he had nothing of the ward's in hand with which to satisfy the judgment, then he would not be chargeable. But the reverse being inferable, the defendant in receiving the excess of his ward's share of the estate represented by the plaintiff, stands in the predicament of an agent who has received money for his principal, which he has not paid over, and which the latter could not rightfully retain. In such case, if the party who has paid it is entitled to its return, he may maintain an action for money had and received against the agent; and we cannot doubt that such an action may be maintained upon the facts disclosed in the record before us.

The fact that the plaintiff had settled his administration account, and been discharged from his trust, cannot affect his right to recover. It was not competent for the orphans' court, upon such settlement, to have permitted him to retain for the excess paid the defendant, to the prejudice of any one else interested in the estate; nor could that court have rendered a decree in his favor for the amount on which an execution could issue. All that it could have done was to ascertain and declare the amount of the ward's share, and how much had been paid to his guardian. The plaintiff's right to recover the excess was personal—it pertained to himself, in his individual capacity, and his disconnection with the estate could not extinguish it.

We do not understand that the plaintiff in error relies upon the direction in the judgment, that it be levied on the goods and chattels, lands and tenements of the ward in the defend-

ant's hands, as a fatal error. In analogy to our previous decisions, it must be regarded as a mere clerical misprision at most, amendable on motion in the county court, or here, at the costs of the plaintiff in error. The judgment in other respects is unobjectionable, and is consequently affirmed.

CURRY & HAYNEE v. ROBINSON, USE, &c.

1. Where an attorney stated a letter was written by him by the plaintiff which was lost, and the contents not remembered by him, another person, to whom the attorney showed the letter, is competent to prove its contents, although he has no knowledge of the hand-writing. The identity of the letter, and the proof of its contents, are questions for the jury.

Writ of Error to the Circuit Court of Pickens.

DEBT, by Robinson against Curry & Haynee. The defence relied on at the trial was, the plaintiff had ratified certain proceedings of an attorney at law, intrusted with the note sued on, by which these defendants were discharged. In the course of the trial, the attorney was offered by the defendants as a witness, to prove the existence and loss of a certain letter from the plaintiff to him, the contents of which the defendants asserted were important in their defence. This witness stated he had received a letter from the plaintiffs, which he had lost, and the contents of which he had forgotten—that he did not remember to have showed this letter to one Ferguson, (a witness then present,) but it was probable he had, as he and Ferguson were then on very intimate terms, and if Mr. F. said so, he without doubt had done so. Ferguson then stated as to the fact of the letter (shown to him by the attorney) being written by the plaintiff, he had no knowledge, except what was derived from the attorney. The defendants then proposed to prove by Fer-

guson, the contents of the letter, but the court refused.

The defendants excepted, and here assign the refusal as error.

B. F. PORTER, for the plaintiff in error, insisted—

1. The proof offered was the best evidence to be obtained, of the contents of the letter. [1 Stark. R. 167 ; Brown v. Woodman, 6 C. & P. 206.]

2. The proof was secondary, and as to such there are no degrees. [Greenl. Ev. § 84.]

3. There was no presumption here, of the existence of better evidence, and the whole matter was a question whether the contents were in fact proved. [Kennon v. Bank, 9 Wheat. 583 ; 2 Halst. 46 ; U. S. v. Button, 2 Mason, 464 ; Jackson v. Vail, 7 Wend. 125 ; Kealing v. Ball, Peake's Ev. App. 1 ; Ross v. Gilbert, 7 M. & W. 102.]

L. CLARK, contra, insisted there was no proof that the letter written to the attorney was, in point of fact, a letter from the plaintiff, or that the one spoken of by Ferguson was indetical with that received by the attorney.

GOLDTHWAITE, J.—There can be no question, we think, that the existence of a letter from the plaintiff to his attorney, as well as its loss, was sufficiently established by the testimony of the attorney. What the contents of this letter were, was what the defendants further proposed to show. It is evident that this portion of the investigation was a matter solely for the jury. Whether the witness would have been able to satisfy the jury that he remembered the contents, or whether the letter which he spoke of was the same identical letter of which the existence and loss were proved, should have been submitted to the jury. The American doctrine on this subject, as deduced from the cases, is said by a late writer on evidence, to be, that if from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it ; but that when the nature of the case does not of itself disclose the existence of such better evi-

dence, the objector must not only show that there is such better evidence, but must also prove its existence was known to the party offering the inferior sort. [Greenl. Ev. cases cited in note 2, § 84.]

In the case at bar, if the party could not be allowed to prove the contents of the letter, in the manner he proposed, it is clear no other mode of proof was open to him, and therefore he comes within the rule just quoted.

We think the evidence proposed to be given was admissible—whether it would have been satisfactory after its admission was matter for the jury.

Judgment reversed and the cause remanded.

CAWTHORNE v. KNIGHT.

1. A stranger to the proceedings cannot move to amend the return made by the sheriff, by striking out a levy made on a slave, upon the ground that it did not belong to any of the defendants in the execution, but was the property of the applicant.

Appeal from the Orphans' Court of Henry.

AN execution having issued in favor of the defendant in error, against Moses K. Speight, and others, which was levied on sundry slaves, and amongst others on one by the name of Bob, the plaintiff in error, who was not a party to the execution, moved the court for leave to the sheriff to amend his return, so as to show that Bob was not levied on as the property of any defendant in the execution, but of the plaintiff in error, and moved the court to set aside the levy, as regarded the slave Bob; and introduced testimony tending to prove such to be the fact, and that the plaintiff in execution

had pointed out the slave to be levied on; and further, the plaintiff in error offered to prove, that the slave levied on was her's, and never had been the property of any of the defendants in execution.

The court overruled both motions, and the plaintiff excepted, and now assigns the refusal as error.

BELSER and BUFORD, for plaintiff in error. If the sheriff is guilty of an irregularity to the prejudice of either party, or of a stranger, the court will set it aside. [Mobile Cot. Press v. Moore, 9 Porter, 687; 3 Ala. 286; 6 Id. 221; 7 Id. 593; 5 S. & P. 402.]

J. COCHRAN, contra.

ORMOND, J.—The authority conferred on the sheriff by the execution, was to levy on the property of the defendants, and if he has levied on the property of a stranger, our statutory method of the trial of the right of property, or the common law action of trespass, will afford the injured party ample redress. The motion to set aside the levy, involved a decision of the question, whether the slave was the property of the defendants in execution, or of the plaintiff in error, which the court had no power to determine in this summary way.

The court will, it is true, in some cases of pressing necessity, and where no other adequate remedy exists, act summarily, and prevent the abuse of its process—as where a sheriff, in executing an *habere facias*, delivers possession of lands which have not been recovered by the judgment, and when in the execution of a *feri facias*, by the fraudulent or improper conduct of the sheriff, injury has resulted, the court may set aside the sale. [Mobile Cot. Press v. Moore, 9 Ala. 692, and cases there cited.]

The interference of the court in such cases is, to prevent the abuse of its process, but it never has been supposed, that under color of exercising this right, it could in this summary way determine upon conflicting titles to property.

The right of a sheriff to amend his return, according to

the truth of the case, is always conceded to him by the court, when it does not impair rights which have vested in others. [Watkins v. Gayle, 4 Ala. 153; McGehee v. McGehee, 8 Id. 86.] But this is always at the instance of the sheriff himself, who is responsible for the consequences attending the act. It could not be permitted, that a stranger to the proceedings should be allowed thus to affect the rights of parties, by changing the return made by the sheriff. In every view we can take of this case, the judgment of the court appears to us to be correct, and must be affirmed.

SMITH v. ROBINSON.

1. Where in an action by the indorsee against the indorser, the declaration alleges that after the note became due and payable according to its tenor, to wit, on, &c. the note was duly presented for payment; though the time stated under the *videlicet* was a day previous to the maturity of the note, yet the generality of the declaration will control it, and be held sufficient.
2. Where the writ in an action against several indorsers of a note is served on one only, it is competent for the plaintiff to proceed against him and discontinue as to the others.
3. It is allowable for a court to set aside a non-suit at the term at which it is rendered, though no notice was given to the defendant that a motion would be made for that purpose.
4. In an action against an indorser, it is competent to render a judgment final by default, without the intervention of a jury.
5. Where a promissory note is dated at "Macon," and "payable at either of the banks in Macon," it cannot in the absence of an allegation or proof be intended that "Macon" is in another State, so as to devolve upon the plaintiff the necessity of proving the rate of interest abroad; especially as there is a county and perhaps several villages called "Macon" in Alabama, though there is no *incorporated bank* in either.
6. Where leave is given to file a declaration upon setting aside a non-suit, if one is found in the transcript, corresponding with the cause of action indorsed on the writ, it will be presumed to have been filed previous to the rendition of the judgment.

7. Where a judgment in an action on a demand ascertained by writing is for more than principal and interest, it will be corrected in the primary court on motion, or by the supreme court at the cost of the plaintiff in error.

Writ of Error to the Circuit Court of Barbour.

THIS was an action of assumpsit at the suit of the defendant in error as indorsee, against the plaintiff in error as indorser of a promissory note dated at *Macon*, 27th March, 1838, "payable at either of the banks in *Macon*," eight months after date. A judgment by default was rendered against the defendant below.

J. E. BELSER, for the plaintiff in error, cited *Minor's Rep.* 5, 77, 125; 1 *Stew. Rep.* 412; 1 *Stew. & Por. Rep.* 247; 2 *Porter's Rep.* 286; 4 *Id.* 415, 423; 9 *Id.* 511; 1 *Ala. Rep.* 74; 3 *Ala. Rep.* 741; 5 *Id.* 633.

COLLIER, C. J.—It is assigned for error—1. That the demand of the note and protest for non-payment were made previous to the maturity of the note. 2. That the suit being discontinued as to all the defendants but the one on whom the process was served, it operated a discontinuance of the action. 3. It was irregular to render a judgment by default after the defendant's appearance. 4. The judgment of non-suit should not have been set aside without a notice to the defendant. 5. The judgment should not have been rendered without the intervention of a jury; but if this was permissible, the damages are larger than the cause of action warrants. 6. No judgment should have been rendered without a declaration.

1. The declaration alledges that after the note became due and payable according to its tenor, to wit, &c. the note was duly presented for payment, &c. It is true that the day alledged under a *videlicet* states that the presentment was made at a time when it was not payable, yet the general allegation that payment was duly demanded at its maturity, is quite sufficient; what follows is mere surplusage, and is controlled by it. *Utile per inutile non vitiatur.*

2. The writ issued against several defendants, and was returned "not found" as to all of them, but the one against whom the plaintiff declared. This is clearly authorized by our statute; it has been the unvarying practice thus to proceed, and has been sanctioned by this court as often as the question has arisen.

3. It is shown by the record, that the defendant appeared and moved the court to require the plaintiff, who was alleged to be a non-resident, to give security, but he interposed no plea, nor did he appear when called to gainsay the plaintiff's demand of judgment. This assignment then is not sustained by the record.

4. It was a matter within the discretion of the court to set aside the non-suit, at the same term at which it was entered, and being discretionary, it was altogether regular to act without first giving notice to the defendant, or requiring him to show cause against it. The non-suit might have been set aside in despite of every objection the defendant could have urged against it, and it cannot be assumed, from the want of a notice that the plaintiff was prejudiced.

5. It was clearly competent for the circuit court, without the intervention of a jury to have rendered a final judgment by default. The failure of the defendant to appear and defend, impliedly admitted the due presentment of the note for payment, and notice to the defendant. This point has been repeatedly so ruled, and is not now open to disputation.

The note does not indicate in what State "Macon," (the place where it is made and dated,) is situated, nor does the declaration contain any allegation on this point. True, it is "*payable at either of the banks in Macon,*" and if by this we are to understand incorporated institutions for the purpose of dealing in money, exchange, &c. it might be safely assumed that the place of payment was *extra territorium*; as we have no such bank at a place bearing that name in this State. But we cannot intend that "Macon" is in one of the sister States, or in a foreign country, upon an inspection of what appears in the record before us. We know that we have a county of that name, and perhaps several villages. In this uncertainty of the record, we cannot conclude *judicially*, (however we may suppose the fact to be,) that the place

of payment is not in this State, and cannot know that by "*banks*" something else was not intended than the term usually imports. There was no necessity for submitting the case to the jury, as upon writ of inquiry to estimate the interest due according to the law of some other country, not indicated by the record. It devolves upon the plaintiff to show affirmatively the error of which he complains—all allowable presumptions are against him.

6. Upon setting aside the non-suit, the court gave the plaintiff leave to file a declaration, and finding one in the transcript adapted to the cause of action indorsed on the writ, we must presume that it was filed previous to the rendition of judgment.

If the damages assessed are for a larger sum than the principal, and interest of the note declared on, the judgment will be here corrected at the costs of the plaintiff in error—in all other respects it must be affirmed.

WALKE v. McGEHEE.

1. In proceedings by garnishee process, *it seems* such demands only can be condemned, as would entitle the attachment or judgment debtor to recover in debt, or *indebitatus assumpsit*.
2. A promise to divide the rent of certain land for the year 1843, and until the determination of a named suit, induced by the undertaking of the promisee to produce evidence on the trial of a suit in chancery, showing the failure of consideration of certain notes, will enable the promisee to maintain *indebitatus assumpsit* on showing the receipt of notes.
3. In a suit against the promisor in such a contract, it is not incumbent on the plaintiff to show any performance of his undertaking, the promise to perform being a sufficient consideration to sustain the contract.

Writ of Error to the Circuit Court of Perry.

McGEHEE was summoned as garnishee, as the debtor of one Falls, at the suit of Walke; and having denied any indebtedness, the plaintiff made the requisite oath to contest this fact, and afterwards an issue was made between these parties, in which the plaintiff asserted that McGehee, at the time of the service of garnishment was indebted to Falls.

At the trial, the plaintiff proved an instrument, signed by both Falls and McGehee, in these terms: "The rent of the Fluker place, in the tract of land sold by the marshall, as the property of John Falls, is to be equally divided between said McGehee and Falls, for the year 1843, and until a suit in chancery, Weissinger, &c. v. said Falls, is determined. Attorney's fee to be paid out of rent. June 22, 1842." The proof in regard to the consideration of this instrument was this: McGehee had purchased land of Falls, upon which, as was afterwards ascertained, there was a lien by an unsatisfied judgment against Falls. Falls had given a mortgage to one Gorman on the tract of land mentioned in the instrument as the Fluker tract, to secure notes for about \$6,000, and was in possession of said tract, holding and owning the equity of redemption. The execution on the outstanding judgment against Falls, was levied on the Fluker tract, and Falls' equity of redemption sold. McGehee became the purchaser, bidding the amount for which the judgment was a lien on the land by him before bought from Falls. After, or about this time, Weissinger, as the executor of Gorman, filed his bill in chancery to foreclose the mortgage on the Fluker tract, and in a conversation between McGehee and Falls about said suit, Falls professed to be able to produce evidence showing the consideration of the notes for which the mortgage was given, had failed to a considerable amount, say nearly one half, and undertook to do so on said trial in chancery. This was the consideration and inducement with McGehee for executing the instrument above stated. There was proof that McGehee had received and enjoyed the rents of the Fluker tract for the year 1843, and up to the time of trial, and that the same was of the yearly value of from

three to \$500. There was proof that a suit in chancery was brought by Weissinger against Falls, to foreclose the mortgage, and that the answer was filed, and the suit then pending undetermined. There was no proof that any evidence had been produced by Falls, tending to show a failure of consideration for the notes for which the mortgage was given.

The court was requested by the plaintiff to instruct the jury that McGehee was indebted to Falls for one half the rent of the Fluker tract, (deducting his part of an attorney's fee,) from the year 1843, and including that year, on the face of the instrument itself, and without showing a previous performance of his undertaking, to produce testimony, &c. and they should find the issue for the plaintiff. This the court refused, and instructed the jury, that unless Falls had produced proof of performance, McGehee was not indebted.

The plaintiff excepted, and assigns that the court erred in refusing the charge requested.

JOHNS, for the plaintiff in error, insisted—

1. That the promise of Falls was a sufficient consideration to support the promise by McGehee, and in such cases it is unnecessary to aver, or prove performance. [Story on Con. §127; Briggs v. Tillotson, 8 John. 306; Hob. 88, b.; 1 Saund. 320, note 1.]

2. If the contract of McGehee is dependent, yet a defence having been entered, and he having received a benefit, will not be permitted against a creditor to claim performance as a condition precedent. [Bell v. Perrine, 10 Wend. 219.]

E. W. PECK, contra, argued—

1. The agreement, connected with the evidence of Lee, shows that the relation of debtor and creditor did not exist between Falls and the defendant in error, and consequently whatever may have been the rights of the respective parties to it, there was no ground to condemn McGehee as Falls' debtor.

2. Falls, if he had any remedy on this agreement, would have had to declare upon it specially, setting out the consid-

eration, and averring that he had performed, or was ready to perform, his part, &c., that is, that he was able to, and had, or was ready to produce the evidence, &c. If so, then the creditor of Falls cannot reach McGehee by garnishment.

GOLDTHWAITE, J.—1. We are inclined to think that a demand against a garnishee can be subjected to process of attachment only when a debt is actually existing. Our statutes, when they speak of indebtedness to the defendant in attachment or judgment, refer to such indebtedness as would enable the creditor himself to maintain either debt or *indebitatus assumpsit*; but it is unnecessary now to determine this point here, as we consider the garnishee thus liable in this instance.

2. Although the case was not put to the jury on this point, yet it is certain we shall advance considerably towards a conclusion upon the merits, by ascertaining whether the contract proved, would warrant Falls in pursuing McGehee by either of these forms of action. Assuming that the written instrument cannot be considered as a written promise to pay a debt or perform a duty, within the terms of our statute, so as by itself to import a consideration, it becomes necessary to ascertain if one is proved. It appears, then, that Falls undertook on the trial of a named chancery suit, to produce evidence showing the consideration of certain notes had failed to a considerable amount. If this consideration was incorporated in the writing, its form would then be, that in consideration that Falls would produce, or had promised to produce such evidence, it was agreed by McGehee that the rents of the Fluker place were to be equally divided between them for the year 1843, and until the particular suit was determined. The contract in this form would be one by which McGehee undertook to divide the rents with Falls until the determination of the suit, and there would be no term in it from which the intention could be inferred that nothing was to be paid until the evidence was produced. It seems to differ in no respect from any other engagement in which one party promises to pay a sum of money on a day certain in consideration of a promise to him to perform some duty at a future day.

The matter which McGehee undertook to perform was the dividing of the rents as soon as received, and as this was capable of being reduced to a sum *in numero*, it follows that *indebitatis assumpsit* might be maintained by Falls, if the rents were received in money. If in point of fact the land was not rented, but merely occupied by McGehee, it is possible a different question would arise.

3. Having ascertained, then, that Falls, the debtor, could maintain *indebitatis assumpsit* on this contract, we shall proceed to ascertain when the right to bring this action accrued, or might accrue. The circuit court considered the right dependent on the production of the evidence, but in our judgment, the contract is one which bound McGehee to divide the rents when received, and bound Falls to produce the evidence at the trial. In speaking of executory considerations, it is said the consideration, and the promise of the defendant, are two distinct things, and in order to show that the plaintiff possesses a right of action, it is in general necessary to aver the performance of the consideration on his part: but in cases of mutual promises, it is not always necessary to aver performance of the thing stipulated to be done—the plaintiff's *agreement* to perform being a sufficient consideration—unless the *performance* of one act be the consideration of the performance of the other. [Chitty on Plead. 324-5.] If the rule was otherwise, it would be impossible to make a valid contract to pay money presently in consideration of a duty to be afterwards performed.

It has been urged, is McGehee bound at all events to pay for services which cannot or may not hereafter be performed? If it is entirely out of the power of Falls to prove what he undertook to show at the trial, as probably would be the case if the consideration had not failed, we perceive no greater difficulty in making the defence than there would be in any other case of false representation; and if he is not able to perform his contract from any other cause, it is no more than the ordinary case of default, which the party might have, but has not guarded against.

Taking the contract in connection with the circumstances and consideration which led to it, we think the intention of

the parties is manifest, that the rents were divisible as soon as received, and in this view, the charge of the court below is erroneous.

Judgment reversed and cause remanded.

PEARSON, ET AL. V. GAYLE.

1. The right conferred on the bank, of suing out an attachment in the county of its location, is a privilege conferred on it, and does not abridge the power it previously possessed, of suing out attachments in the county of the residence of the defendant.
2. When the clerk, pursuant to an order of the court, that a bond to be approved by him should be filed within ninety days, receives a bond within the time, and endorses it, *filed in office*, he cannot afterwards be permitted to testify, that he did not approve or disapprove it.
3. It is no defence at law, either partial or total, that the creditor at the instance of the surety, agreed to file the note in the clerk's office for a dividend, the principal being dead, and insolvent, and that for want of the necessary affidavit, it was rejected by the orphans' court. If the party has any redress, it must be by action, to recover damages for the misfeasance. Whether a court of equity would afford redress—*Quere?*

Writ of Error to the Circuit Court of Talladega.

ASSUMPSIT by the defendant, against the plaintiff in error. After the return of the writ, the plaintiff, by his agent, made oath, that the defendant was about to remove his property out of the State, and prayed an ancillary attachment, which issued and was levied on some slaves.

The defendant moved the court to quash the attachment, and set aside the levy for errors apparent on the attachment, and because no bond had been given. The court made an order quashing the attachment, and setting aside the levy, unless within ninety days from that day, the plaintiff should execute a sufficient bond, to be taken and approved by the clerk.

At the succeeding term, a motion was made to quash the attachment for a failure to comply with the terms.

The facts are, that within the time limited by the order, the attorney of the plaintiff, received by mail from Mobile a bond purporting to be under the seal of the bank, with security, which he handed to the deputy of the clerk, the principal being absent, who, without inquiry or approval of the bond, filed it, making an indorsement thereon, filed in office, 25th May, 1846. The deputy knew what the bond was, and its object. Another bond was also filed, after the motion was made, the particulars of which need not be stated. The court refused to quash the attachment.

The case was then submitted to the court, upon the following agreed facts :

On the 8th March, 1845, the estate of Eli Shortridge, the principal in the note now in suit, was reported insolvent to the orphans' court, and on the 1st April, 1845, duly declared insolvent. About the 20th June, 1845, according to the notice and request of the defendant, who was a surety on the note, it was filed in the office of the clerk of the orphans' court by the plaintiff. On the 16th July, 1845, the defendant paid \$262 50 on the note, and on the 13th February, 1846, the orphans' court proceeded to make a final settlement of the estate, and upon the objection of the administrator, the note was rejected by the court, for want of an affidavit, such as the statute requires, and denied any participation in the assets of the estate. It was agreed, that if, upon this state of facts, the defendant was entitled to make a defence against the note, either in whole or to a part, only, judgment should be so rendered in his favor, otherwise in favor of the plaintiff.

Thereupon the court decided that these facts were not any defence to the action, either total or partial, and rendered judgment for the amount of the note. This is now assigned as error.

S. F. RICE, for plaintiff in error, moved this court for a rule upon the judge of the circuit court, to show cause why the attachment should not be quashed, which being refused, he then argued the merits.

L. E. PARSONS, contra.

ORMOND, J.—It is contended, that the law authorizing the banks to sue out attachments, returnable into the counties in which they are located, (Clay's Dig. 64,) does not authorize them to sue out an attachment returnable to the county of the defendant's residence, when the suit is there commenced. We consider this construction of the law wholly untenable. The right of the bank to sue in the county of its location, is a privilege conferred on the bank, but by no rule of construction can this deprive the bank of its right to sue the defendant in the county of his residence, either by attachment, or in the ordinary mode; to hold otherwise, would be to convert what was intended as a privilege into a restriction. It was not intended by this act to abridge any of the privileges before conferred on the bank, but merely to add another, the right to sue out an attachment returnable to the county of its location.

We dismiss all the argument in relation to the constitutionality of the act authorizing the bank to sue out attachments, without executing a bond, and to the sufficiency of the last bond executed, because there was a literal compliance with the order of the court requiring a bond to be filed, within ninety days. The position, that the clerk, though he received the bond, filed and indorsed it, may still be permitted to testify that he never approved it, cannot be admitted. By receiving it, and filing and indorsing that fact upon the bond, he is estopped from denying that he approved it. His approbation is a mental act, which can only be manifested by the reception, and filing of the bond, as his disapprobation would be by his refusal to receive and file it. This is quite too clear a proposition to require further illustration. This point was in effect decided in *McClure v. Colclough*, 5 Ala. R. 65. The rule for a mandamus must be denied.

We proceed to the consideration of the merits of the case. The discharge of the surety from liability to the creditor, upon the note in this case, is claimed, because the bank did not at the request of the surety, file the claim in the orphans' court, with the necessary affidavit, so as to entitle the credi-

tor to a *pro rata* dividend upon the note, but that on the contrary, for the want of this affidavit, the claim was rejected.

To a proper understanding of this question, it is necessary to inquire, what were the respective rights of the creditor, and the surety, upon the estate of the principal debtor being declared insolvent. The creditor, as is admitted, was under no obligation to make presentment of the claim to the orphans' court, and if the surety desired to come in as a creditor of the estate, he should have discharged the debt and presented his claim. It follows, therefore, that the act of the creditor, in presenting the claim, was for the benefit of the surety, and his agreement to do so, if in fact there was an agreement, was without consideration.

But it is strenuously urged, that if the creditor omits to do an act when required by the surety, which duty enjoins him to do, and the omission is injurious to the surety, he is discharged. Conceding this to be the law, it does not establish that the surety is discharged in this case. Here he had no right to call on the creditor to prosecute this claim on the insolvent estate; the refusal, or omission, therefore, could not have been a violation of any duty, and if the omission is injurious to the surety, it is an injury for which the law can afford him no redress.

It is also urged, that although the act of filing the claim by the bank was gratuitous, and such as it could not have been required to do, yet, having undertaken to do the act, and having done it in such a manner, that an injury has thereby accrued to the surety, the loss must fall on the bank. A party may doubtless be responsible for a loss, occasioned by an act done gratuitously, at the request of another, but the only means by which the injured party could obtain redress, would be by an action for the misfeasance. This right of action, certainly could not be set up to defeat an action upon another contract. As the breach of one contract, could not be pleaded in bar of a suit upon another contract, neither could the damage sustained by such breach be set up as a partial defence in the nature of a set off, for the obvious reason, that the damage is unliquidated, and could only be ascertained by a suit for the breach of such contract.

It was also supposed in argument, that the omission on the part of the bank to file the affidavit, and the consequent rejection of the claim by the orphans' court, will discharge the surety, because no action can be maintained against the administrator of an insolvent estate. It is certainly true, that from the accessorial character of the contract of suretyship, when the right of the creditor is gone to enforce the debt against the principal, he cannot coerce payment from the surety. But this rule only applies, where the right has been extinguished by the act of the creditor, not when it occurs by operation of law, as in a discharge in bankruptcy. The assumption of the argument, that this result has been produced by the act of the bank, is without foundation, as the inability to sue the administrator would have been precisely the same, if the affidavit had been filed, and a dividend declared.

It is said, however, that where the creditor does, or omits to do an act, injurious to the surety, the surety is discharged, without regard to the extent of the loss. This is true only of acts done by the creditor, as where the time of payment is delayed by a contract between the creditor and debtor, without the consent of the surety; in such a case the surety is absolved, because of the change in the contract, and it is unimportant to what extent he is injured by it, or whether he is injured at all. Our books are full of illustrations of this principle. An omission to act by the creditor, as it cannot alter the original contract, is attended by different results. Mere passiveness on the part of the creditor, has never been held to affect his right to proceed afterwards against the surety. The only duty which the surety can require the creditor to perform, at common law, is to sue the principal debtor, but his omission to bring the suit, does not necessarily discharge the surety. To produce this result there must be a loss consequent on the omission of the creditor. This is the duty referred to in the case of *King v. Baldwin*, 17 John. 384, the omission of which, when required by the surety, would, if injurious to the surety, be a discharge of his liability. If there was an omission of duty here, by the neglect of the bank to file the affidavit, upon the request of the surety, the latter would not, as contended, be discharged from

liability for the entire debt, as a consequence of the omission, but only to the extent of the injury sustained by the surety, from such omission. But it has been shown, and indeed is admitted that this was a duty which the surety had no right to call on the creditor to perform, the doctrine therefore relied on, has no application to the case. If it be conceded, that the surety has been injured by the omission of the bank, and that he has a right to demand redress, it will not in the slightest degree affect the right of the bank to recover on this contract.

The rights of sureties are now well settled, both in this court and elsewhere, and rest upon clear, intelligible, and well established principles, deduced from the rights and obligations of the parties to the contract. The doctrine contended for, would be a most alarming innovation of the settled doctrine, and cannot receive our sanction.

To prevent misapprehension, it may be proper to say, that nothing said in this case is intended to forestall an examination in a court of chancery of the facts, in such a case as the present. That question not being now before the court, it would be improper to make an intimation either way.

Let the judgment be affirmed.

THE BRANCH OF THE BANK OF THE STATE OF ALABAMA, AT DECATUR, v. RHODES.

1. In a suit commenced by notice and motion at the instance of the bank against the second indorser of a bill drawn in Alabama on a firm in New Orleans—on a trial before the jury, the plaintiff offered the protest of a bill agreeing in all respects with that described in the notice, and then produced by him, save only, that the bill described in the protest, and copied thereon, purported to be addressed to "Gamble & Murrah," and the ori-

ginal bill was addressed to Gamble & Murray: *Held*, that although the protest, unaided by other testimony, may be insufficient, yet it should be admitted that the plaintiff may show some or all of the following facts, or others of a kindred import, viz., that "Murrah" was pronounced "Murray;" that there was no such house in New Orleans as the address of the bill indicated; that "Gamble & Murrah" were the factors or correspondents of the drawer in that city; that he was in the habit of drawing on them; that "Murrah" was sometimes written "Murray" by persons who were not accurate spellers. Such evidence would have supplied the defects of the protest, and show that was intended to apply to the bill sued on.

Writ of Error to the Circuit Court of Morgan.

THIS was a proceeding by notice and motion under the statute, at the suit of the plaintiff, against the defendant as the second indorser of a bill drawn in this State and payable in New Orleans. The cause was tried upon the plea of *non assumpsit*, a verdict returned for the defendant, and judgment rendered thereon. On the trial, the plaintiff offered as evidence the protest of a bill of exchange agreeing in all respects with that described in the notice and then produced by him, save only, that the bill described in the protest and copied thereon purported to be addressed to "Gamble & Murrah," and the original was addressed to "Gamble & Murray;" upon motion of the defendant, this paper was excluded from the jury, and the plaintiff excepted.

S. PARSONS, for the plaintiff in error, insisted that the discrepancy between the protest and the bill was not such as to warrant the rejection of the latter. It is not necessary that the protest should state the names of the parties *literally*. The change of one or more letters, if the pronunciation is not affected, is not material. It cannot be assumed that "Murrah" is not pronounced "Murray." The letter *h* may be *silent* or sounded *long*; if so, the sound is identical. [Minor's Rep. 197.]

L. P. WALKER, for the defendant. The protest certifies that the bill indorsed thereon is a true copy of that which

the notary was required to present to the drawees for acceptance, and the bill produced varying from it, the presumption cannot be indulged that the protest applies to it. [Clay's Dig. 380; 7 Ala. Rep. 108; 3 Phil. Ev. C. & H's Notes, 1052.] The bill must be copied upon the protest literally, and the mistake in a name of a single letter will be a fatal variance, although the sound of the name is not changed. [4 Phil. Ev. C. & H. ed. and Notes, 4-7.] But if it be competent to describe the bill according to its legal effect, the description must be such as to show its identity. [2 Phil. Ev. C. & H's Notes, 250; 4 Ala. Rep. 184.] "Sound, which is the substance of a name," is not preserved in the protest—the difference in the spelling alters the sound, and consequently makes a different name. [7 Am. Com. Law Cas. 56, and Note; 3 Pet. Dig. 78; 2 Phil. Ev. C. & H's Notes, 520; 4 Id. 7; see Minor's Rep. 197.] The court cannot know that "Gamble & Murray" were intended for "Gamble & Murrah," and that they are not distinct firms. It was competent for the notary to explain or contradict his protest, and the failure to adduce his evidence turns every doubt against the plaintiff. [7 Ala. Rep. 108; 9 Ala. Rep. 631; 2 Phil. Ev. C. & H's Notes, 293; 2 U. S. Dig. 61, § 3.]

COLLIER, C. J.—It is conceded that the paper on which the defendant is sought to be charged as an indorser, is a foreign bill; consequently, it devolved upon the plaintiff to show that it had been duly protested. A protest is said to be a solemn declaration on behalf of the holder against any loss to be sustained by the non-acceptance, or the non-payment of the bill, as the case may be. "It is highly important, even if it be not absolutely essential, in all cases, that a copy of the bill should be prefixed to all protests, with the indorsements thereon, *verbatim*, whenever practicable, and that the reasons given by the drawee for non-acceptance or non-payment, should also be stated in the protest." [Story on Bills, § 276.] Chitty, in his treatise on Bills, (9 Am. ed. 363) remarks: "A copy of the bill should, it is said, be prefixed to all protests, with the indorsements transcribed *verbatim*, and with an account of the reason given by the party why he does not honor the bill." Neither of these learned

authors refer to any adjudged case; but merely cite, Pothier de Change, n. 135, 145, 148; Pardessus Droit Comm. Art. 419; Code de Comm. 174.

In *Bryden v. Taylor*, 2 Har. & J. Rep. 396, the court considered that the minutes of the proceedings of a notary public were records under the courtesy of nations; and that a copy under the hand and official seal of the notary was sufficient evidence of the protest of a foreign bill for non-acceptance.

These citations we think do not establish that a protest is so conclusive as evidence, that no extrinsic proof is admissible to aid it, or show its adaptation to the bill. Neither of the elementary writers whose works we have cited, inform us what are their opinions as to the necessity of making a copy of the bill upon the protest. It is certainly the practice to do so, yet if the copy were omitted, and the protest identified the bill by a description so minute as to leave no ground for mistake, we should be inclined to hesitate before we would pronounce against it.

In *Sterry v. Robinson*, 1 Day's Rep. 11, a bill of exchange was addressed to Josiah R., meaning Joshua R. The court held that the mistake in the bill of the christian name of the drawee, is immaterial, if the bill be presented to the person intended; and the declaration might alledge the mistake and due presentation. [See also *Doug. Rep. 55.*] So in *Ross, et al. v. Planters' Bank*, 5 Hump. Rep. 335, the notary was permitted to prove at the circuit that in the copy of the note on the back of the protest, he made a mistake of the date—dating it a year in advance of the true time. The notary's entry of the protest read by him to the jury, had the correct date of the note. The supreme court of Tennessee said, "similar corrections of the notarial record, furnished as notice to the parties, have been often allowed, and are sanctioned by many authorities referred to in the argument. The court in such cases taking care to leave the question properly to the jury as to the identity of the instrument mentioned in the notice with that sued on, and as to whether the parties, notwithstanding such mistake, had substantial notice, as to what security it was intended to fix their liability by the notarial protest actually furnished them."

The case of the Branch Bank at Decatur v. Hodges, 9 Al. Rep. 631, is unlike the present. There, the protest for *non-acceptance* was unobjectionable, but in the certificate that notices were sent, the name of the second indorser was mistaken; this it was holden did not vitiate the protest; and even if the mistake was in describing the bill, it would not avail the drawers in an action against them. It was also held that a protest for *non-payment*, which misdescribed the date of the bill, was inadmissible.

Conceding that a copy of the bill should accompany and make part of the protest, yet a mere literal variance in the spelling of a word, as *abby* for *abbey*, *undertood* for *understood*, or a similar slip of the pen, not changing the word to one of different signification, will be overlooked. [3 Stark. Ev. 1587; Alebery v. Walby, 1 Stra. Rep. 229.] So, the mis-spelling of the name of an individual will not vitiate, if the sound be not changed; as where one is *Segrave* and the other *Seagrave*. [2 Stra. Rep. 889.]

In the case at bar the notary should have alledged the presentment of the bill to "Gamble & Murrah," if this was the name of the firm who were intended as the drawees, but he should have copied it literally. Yet a departure in this respect we cannot think would be always fatal. It may be that bills are not always legibly written, and all notaries are not competent to make a *fac simile*; if trivial mistakes in a word or a name were allowed to exclude a protest, injustice would not unfrequently result.

There are numerous cases in which it has been allowed to look out of the instrument to the circumstances to which its terms either expressly or tacitly refer, or which attend its execution. [3 Phil. Ev. C. & H's Notes, 1406-7, *et post.*] So it is well settled that a devise, bequest, or grant, shall not fail, or vest in an improper person, in consequence of a misnomer of the party intended to take, where the intention of the testator, or grantor, is expressed in the instrument. For the purpose of effectuating that intention, parol evidence is received. [3 Phil. Ev. 1368 to 1376.] The decisions upon this point are sustained by the maxim, *falsa demonstratio non nocet*.

If *h* in the name of *Murrah* be sounded, then it is not

idem sonans with *Murray*; but if it be silent, then the pronunciation is the same. Perhaps it would be too much to assume the identity of the names, yet we cannot avoid the conclusion, that extrinsic proof is admissible to explicate the matter. The dissimilarity of the name is not such as to make it a legal conclusion it is not a case of mis-spelling. It may be, that the bill was intended to be drawn on "Gamble & Murrah," whose names are really pronounced "Gamble & Murray." If so, does not the case cited from Day's Reports show, that the presentment should have been made to these drawees? Here the suit was commenced by notice, and a motion consequent upon it, so that the plaintiff could not alledge upon the record the mistake in the address of the bill, yet it was competent for him to prove, what was necessary to have alledged and proved if suit had been brought in the ordinary manner, and a declaration filed in the usual form.

The resemblance of the names of the drawees, as written upon the face of the bill, and in the protest, is such, that it cannot be assumed, that the bill produced by the plaintiffs is not the one to which the protest was intended to apply; especially, as in all other respects there is a literal agreement. So that, although the protest, unaided by other testimony, may have been insufficient, yet the court should not have rejected it as altogether irrelevant. Upon its being admitted, the plaintiff might have shown, that 'Murrah' was pronounced as 'Murray'; that there was no such house in New Orleans as the address of the bill indicated; that 'Gamble & Murrah' were the factors, or correspondents of the drawer in that city; that he was in the habit of drawing on them; that 'Murrah' was sometimes written 'Murray,' by persons who were not accurate spellers, &c. Such proof would of course follow, and could not precede the introduction of the protest; and as it would be addressed to the jury, the court should have admitted the protest, that the plaintiff might, if practicable, have supplied its defects. [1 Ala. R. 83.]

What we have said, will sufficiently show the error of the ruling of the circuit court. Its judgment is therefore reversed, and the cause remanded.

MORGAN v. THE STATE.

1. In an indictment for incestuous adultery, it is unnecessary to charge a common knowledge of the relationship, if the charge of knowing of the relationship is made against the party indicted.
2. Natural children are within the statutes defining the degrees within which marriage is prohibited.
3. In an indictment charging a father with living in adultery with his daughter, his confessions that she is so, are admissible in evidence.

Error to the Circuit Court of Barbour.

THE prisoner was indicted for the crime of incest, and convicted at the spring term, 1846.

The indictment charges, that the prisoner, on the 1st September, 1845, in the county of, &c. "being then and there the father of one Sarah Morgan, and within the degree of consanguinity within which marriages are by law declared to be incestuous, and void, and then and there knowing the said Sarah Morgan to be his daughter, did then and there live with said Sarah Morgan, in a state of adultery," &c. &c.

At the trial, no proof was made of a marriage between the prisoner and the mother of Sarah Morgan, but there was proof of his confession that she was his daughter. The court charged the jury, that the prisoner's confessions, and admissions, were competent to prove that Sarah Morgan was his daughter, and refused to charge, that to make out the offence charged in the indictment, an actual marriage between the mother of Sarah Morgan and the prisoner must be proved. The prisoner excepted.

A writ of error having been allowed by this court at its last term, he now assigns—

1. That the indictment is not sufficient to warrant a judgment.

2. That the court erred in the charge given and refused.

J. E. BELSER, for the prisoner, insisted—

1. That under the statute it is necessary for the indictment to charge a common knowledge of the guilty parties, of the relationship. [Dig. 432, § 6.]

2. It admits of question whether the statutory offence can be committed by parties who are not connected legitimately. [Ib. 374, § 8.] And therefore proof of a marriage in fact was essential. [Commonwealth v. Littlejohn, 15 Mass. 163; State v. Roswell, 6 Conn. 446.] Indictments like this bear a strong analogy to those for bigamy, and in those such proof is necessary. [Morris v. Miller, 4 Burr. 2057; State v. Read, 12 Verm. 399; 4 John. 53; 7 Ib. 314; Ford v. Ford, 4 Ala. Rep. 145.]

The ATTORNEY GENERAL, contra, insisted, no question arises in the bill of exceptions involving the marriage, if the crime of incest can be committed with a natural daughter. The statute evidently points to the relation, and not to its lawfulness. For moral and criminal purposes, a bastard has relations. [Queen v. Chafer, 3 Salk. 66.]

If, however, the legal connection between the parties as parent and child, must be sustained by a marriage of the prisoner with the mother of the female, then his admission was sufficient proof. [2 Russ. on Crimes, 644; 1 Greenl. Ev. 250; Roscoe's Crim. Ev. 35; Hawk. P. Cr. 13, 2 ch. 46, § 35; State v. Guild, 5 Halst. 153; Rex v. Eldridge, R. & R. 440.]

GOLDTHWAITE, J.—1. It is argued that this indictment is defective, because it omits to charge the female with knowledge of the relation between herself and the other guilty party. It is true, the statute defines the offence to be the living in a state of adultery of persons within the degrees of consanguinity, or relationship, whose marriages are declared by law to be incestuous and void, *knowing of such consanguinity*, but this, in our judgment, warrants no inference that the knowledge is to be common to both the parties, before the guilt of either can attach. If there can be an aggra-

vation in a crime like this, it would exist in the concealment of that knowledge, which, if communicated, might have prevented its commission. The evident object and intention of this clause in the statute is, to relieve the party ignorant of the relation from the severer penalty imposed on persons living in adultery, when a relationship also exists within the prohibited degrees. We are entirely satisfied the indictment is good.

2. In the view we take of the statutes governing this crime, it is entirely immaterial to ascertain whether the prisoner was, or was not married to the mother of the other party, if the fact was sufficiently established that she was his child. The statute which defines the degrees of relationship within which marriages are prohibited, declares, that if the son shall marry his mother, or step-mother, the brother his sister, the father his daughter, or his daughter's daughter, &c. &c., such persons, so unlawfully married, shall be prosecuted by indictment, and on conviction, the court shall declare the marriage null and void. [Dig. 374, § 6.] It would be presuming very far to suppose the legislature intended here to speak only of legitimate sons and daughters, and brothers and sisters, when the offence against decency and good morals, is the same, whether the ties are legitimate or otherwise. It can scarcely be questioned, we think, that under this statute, if it stood alone in our Digest, the courts would feel compelled to declare a marriage void, between the father, or mother, and his or her natural child, and if this is not its effect, there never has been a time in this State when a marriage between parents and illegitimate children was not legal. Such a condition of society would be alike at variance with the laws of God and man. In England, the statute of 32 Henry VIII. prohibits all marriages within the Levitical degrees, and under this it has been held, a man could not legally marry his sister's bastard daughter. [Vin. Ab. Marriage, F.]

3. Having ascertained that our statutes cover incestuous marriages, and adulteries, between illegitimate, as well as legitimate relations, within the prohibited degrees, it remains to be considered whether the admissions of the prisoner were competent to establish the fact of relationship, so far as he is

concerned. Of this we think there is no question, though an admission of this nature, not corroborated by other evidence, ought certainly to be acted on with great caution. The crime with which the admission is connected, is so revolting to natural propriety and decency, that it would seem almost incredible, and for this reason, if no other, a mere confession of the relationship ought not to produce a conviction. But we do not understand that this was all the evidence before the jury on this subject. The charge is, that the admissions were competent, and we are not prepared to say, they were otherwise.

We can see no error in the record. Judgment affirmed.

EDWARDS v. GIBBS, JUDGE, USE, &c.

1. A suit cannot be maintained against an executor who has declared an estate insolvent, upon his official bond, assigning as a breach, that he had not made a full inventory of the assets.
2. The effect of the decree of insolvency, is to transfer to the 'orphans' court the exclusive jurisdiction of all claims against the estate, and in that court, on the final settlement, it may be shown that the administrator has withheld or wasted the assets. Whether equity might not afford relief in certain cases—*Quere.*

Error to the Circuit Court of Shelby.

DEBT by the defendant, against the plaintiff in error, on his official bond, as executor of Vincent Jones, for the use of Joseph Ellison.

After setting out the bond, and condition, the declaration avers, that said Jones by his will directed all his debts to be paid, and that he died on the .. day of .., 1839, possessed of a large personal estate of great value, to wit, of the value of \$6000, consisting, among other property, of the following

slaves, naming them, being more than sufficient to pay all the debts of the deceased. That the defendant proved the will, and took upon himself the burden of executing it.

He further saith, that said deceased, at the time of his death, was justly indebted to the said Joseph Ellison in the sum of six hundred dollars due by promissory note, dated 20th June, 1839, and payable at the time of his death, and that after the death of the said Jones, to wit, on, &c. the said Ellison commenced an action on said note against the defendant as executor, &c. in the circuit court of the county aforesaid.

The declaration contains three assignments of breaches :

1. That the defendant did not make and return to the clerk of the county court a full inventory of all the goods, &c. of the deceased, according to the statute, &c.

2. That he did not make and return to the clerk's office a full and complete inventory, in this, that he did not embrace in any inventory made and returned by him, the negro slaves aforesaid, or any of them.

3. That on the 15th February, 1841, he reported to the orphans' court, that the estate of his testator was insolvent, and unable to pay all the debts against the estate, when in truth and fact, it was not, as the defendant well knew, and afterwards, to wit, at, &c. pleaded the same to the further prosecution of the said action, by means whereof the said action was abated, as will appear, &c.

To this declaration the defendant demurred, and the court overruled the demurrer ; and the defendant refusing to plead over, by agreement the damages were assessed at \$912, for which a judgment was rendered.

PORTER, for plaintiff in error.

ORMOND, J.—There can be no doubt, that the failure of the executor to return a full and complete inventory of the estate of his testator, was a breach of the condition of his bond, which required him to perform all the duties which are, or may be required of him by law, of which this was one. But in our judgment, this action cannot be maintained under the facts disclosed by the declaration. It appears that the

defendant in error was prosecuting a suit against the plaintiff in error, pending which, upon the representation of the plaintiff in error as executor, the orphans' court declared the estate which he represented insolvent, and according to the law as it then stood, the suit abated. This decree of the orphans' court, cannot be thus collaterally called in question, although at the time it was made, in February, 1841, it was an *ex parte* proceeding, there being then no such provision as is now made by the act of 1843, by which the creditors are allowed to dispute the fact of the insolvency of the estate; yet its effect, when made, was to transfer to the orphans' court the exclusive jurisdiction of all claims against the estate. Its effect was to abate all suits then pending against the personal representative, and to require all creditors to present their claims against the estate within a prescribed period. At the final settlement, when the fund for distribution was ascertained, it was divided amongst the creditors *pro rata*, if not sufficient to satisfy them in full.

At the final settlement, if not previously, it was doubtless competent for the creditors to contest the inventory filed by the executor, and to increase the fund for distribution, by showing either that he had withheld, or converted the assets of the estate, or that they had been wasted or lost by his negligence. [Duffee v. Buchanan, and wife, 8 Ala. 27.] The entire body of our statute law on this subject, contemplates the final settlement of the estate in the orphans' court, and this results necessarily from the fact, that with a few exceptions, all debts are placed upon the same footing, and when the estate is insolvent, the fund for distribution is to be equally divided amongst all the creditors. This settlement when made, is conclusive in favor of the executor or administrator, and in the language of the statute, "shall not be impeached except for fraud in obtaining the same." [Clay's Dig. 304, § 37.]

Whether creditors, or others interested in the estate, might not have relief in equity, when the executor or administrator had withheld the assets, even after the settlement of the estate, is a question we are not called on to consider. It is clear that the decree of the orphans' court declaring an estate insolvent, or its final decree, cannot be collaterally impeach-

ed, by a suit against the personal representative, for the recovery of a debt due from the estate.

The judgment will be reversed, and if desired, the cause will be remanded.

LYON, ET AL. V. HUNT, ET AL.

1. The bill charges with particularity, that L. who is insolvent, claims certain lands as the purchaser at an irregular sale of a tax collector, whose deed he has, that L. was threatening to commit trespasses and waste on the premises, that himself and others, acting avowedly under his authority, are making preparations with a view to their commission, that the complainants have been disturbed in the enjoyment of their property, and are likely to be more seriously interrupted: *Further*, that the complainants are thus prevented from making the profit from their estate which otherwise they would, and its value in market is lessened. *Held*, that it was competent for chancery in such a case, to grant an injunction to stay the commission of trespass and waste; that as the deed ~~threw a~~ cloud over complainants' title, that court might remove the cloud, and direct the cancellation of the deed; especially where the deed, in point of form, was *prima facie valid*.
2. To sustain the title of a purchaser of land under a sale by the collector for the non-payment of taxes, it is necessary for him to show *affirmatively*, that every substantial requisite of the law has been complied with; consequently he must prove that advertisement of the time and place of sale by the collector, was made for the length of time directed by the statute; that the land proposed to be sold was so particularized in the advertisement as to be susceptible of identification, &c. &c.
3. Where a bill charges that the defendant, or a person under whom he claims, failed to perform some legal act, indispensable to the validity of his title, in a manner conformable to law, an affirmation by the defendant in his answer, that the act was regularly performed, without stating with particularity the mode of performance, is not such a denial as requires the testimony of two witnesses, or one witness, and strong circumstances to overbalance it.

Error to the Court of Chancery sitting in Mobile.

THE defendants in error, who are some ten or fifteen individuals, and four corporations or their assignees, filed their bill, setting forth that the Orange or Poplar Grove tract of land in the city of Mobile, which originally contained about two hundred and sixty-three acres, was in the spring of 1835, conveyed by its then proprietors to Thomas W. McCoy, James Magee and Calvin Norris in trust. These trustees entered upon the land in virtue of the deed, and became seized and possessed thereof, for the purposes therein specified.

The complainants alledge, that they are, as tenants in common, interested in so much of the land referred to, as remains in the hands of the trustees unsold, and their title is recognized by each other. Being in quiet enjoyment of the premises, their possession was disturbed by James G. Lyon, George Huggins, and Ulysses T. Cleveland. The disturbance by Lyon was made public by an advertisement contained in the papers of the city of Mobile, one of which is subjoined, and prayed to be taken as a part of the bill. Complainants believe, that the possession referred to in the advertisement is predicated of some act recently done by Huggins, who was the sheriff of Mobile county, from the three years preceding up to August, 1843; that the possession was nothing more than going on the land, making a claim to it, warning people not to touch it. But preparations are being made to place tenants in possession, to commit waste by the removal of earth, and digging and selling dirt—thus ousting the complainants: *Further*, men and carts have been employed and arrayed for that purpose, but the complainants have not been otherwise disturbed except by threats and interference with their lawful control, preventing the community from purchasing dirt and materials upon the land, and otherwise hindering the profitable use of the same.

Complainants charge that Lyon is insolvent, so that an action at law for damages would be unavailing against him. They alledge that the proceedings on the part of Lyon are the result of the illegal conduct of the sheriff. In 1841, Huggins being sheriff of Mobile county, assessed certain lands, described as *the balance of the Orange Grove tract remaining unsold to McCoy, Norris, and Magee, trustees. Tax, \$175 50.* That this land was for the first time advertised

for sale under the description here given in the Mobile Daily Advertiser and Chronicle, on the 7th January, 1842, by Geo. Huggins, for the non-payment of taxes—stating that it would be sold on the 7th February next following. At the sale of this land, complainants have been informed that Lyon became the purchaser, but upon what terms they are wholly ignorant.

It is further stated, that some of the complainants whose names are mentioned, who represented interests in the lands in question, equal to forty-two of the forty-eight shares therein, paid their taxes, on the same, to George Huggins, for the year 1841, and sufficiently described the lands to him to have enabled him to understand to which their payments should be applied.

The trustees, Magee, Norris, and McCoy, resided in Mobile during the years 1841 and 1842, and each of them had personal property more than sufficient to pay the taxes on the premises in question, and upon the service of any warrant upon them would have paid the debt. Some of the complainants, (who are particularly mentioned,) resided in Mobile, and had a sufficiency of personal property there, to pay the taxes assessed; but the sheriff made no effort to collect the same of the trustees, or their *cestuis que trust*, by levy or distress, on their personal property: *Further*, that no other notice of the sale, or description of the property was given than is contained in the advertisement referred to.

Under the proceedings above recited, it is alledged that the defendants are acting, that the deed from Huggins to Lyon, "recites a variety of particulars, and does not describe the land according to the assessment or advertisement," constitutes a cloud upon the complainants' title, and is calculated to impair the beneficial enjoyment of their estate.

It is also stated that the trust under the deed to Magee, Norris, and McCoy, has expired, and the trustees refuse to interfere for the security or protection of the lands in any way; but they have not reconveyed, and the interest of several of the complainants have been acquired since the expiration of the trust.

The bill prays that Lyon, Huggins, and Cleveland, may

answer the same, that they may be enjoined from any entry upon, or interference with the property in question ; that they may abstain from all molestation of the complainants under any pretence whatever, so that they be quieted in their possession from any claim arising out of the illegal proceedings of the defendants ; that the sale by Huggins be annulled, and such other relief be granted as is consistent with equity.

The defendant, Lyon, in his answer, admits that a conveyance was made to McCoy, Magee, and Norris, in 1835, of the lands in question, as trustees, as stated in the bill, and alleges that on the 7th February, 1842, the title to the same was transferred and conveyed to him by George Huggins, then sheriff of Mobile county ; and attaches to his answer a copy of his deed, which he prays may be taken as a part thereof. That previous to its execution, the land was duly advertised for sale, and pursuant thereto was publicly and fairly offered at the court house door, when he, respondent, being the highest bidder, became the purchaser, and paid the purchase money—all which he shall be able to prove when called on in a court of law to do so.

On the 21st August, 1844, Huggins did put respondent into possession of that part of the Orange or Poplar Grove tract, of which he was the purchaser, as shown by a paper attached to the answer, and prayed to be taken as a part thereof.

Respondent does not know what personal estate McCoy, Magee, and Norris had, at the time of the assessment and sale of the land to him, but is informed, and believes, that the two former were insolvent, and that the latter did not then reside in Mobile : *Further*, he has been informed, and believes, that they had no personal estate of the complainants in their hands, at the time of the sale, with which to pay the county, school, and road tax on the land ; and it must be presumed, that the sheriff, in selling it, did his duty.

The respondent admits his inability to pay his debts, but declares he is ready, willing and able, if necessary, to give bond, with good security, to protect, or reimburse the complainants for any damage he may do, or cause to be done, to the land in question, provided the complainants recover the

same by due course of law. He is ignorant of the existence of any receipts for the taxes due on this land in 1841, and if there be such, Huggins was not informed of it.

Respondent denies, in general terms, every other allegation in the bill, not specifically answered, and requires the complainants to prove the same.

Huggins answers that he is ignorant of the matters stated in the bill, in respect to the title to the premises in question; but states, that in 1841, he was sheriff of Mobile county, and that the taxes remained unpaid upon a portion of the tract of land described in the complainant's bill for that year. These taxes were assessed to McCoy, Magee, and Norris, trustees, &c., and in virtue of the law in such cases, the respondent caused that part of the land on which the taxes were unpaid, to be advertised, for the time, and in the manner, required, in the Mobile Daily Advertiser, for sale, on the 7th February, 1842. On that day it was offered, with other property, to pay the road, county, and school taxes, assessed thereon—many persons were present, and the part so offered was struck off to James G. Lyon, who was the highest bidder, for the sum of \$199 77. This sum was paid by the purchaser, and a deed in due form executed and delivered to him by respondent, who, on the 19th August, 1844, placed him in possession.

Respondent does not know, or believe, that McCoy, Magee, and Norris, had in their possession any personal property, belonging to the persons for whom they held the lands in question as trustees, from which the taxes could have been made. That such personal property never was pointed out to him, nor did any one else ever offer to pay these taxes to him. After the advertisement was published, and previous to the sale of the land, respondent informed Sydney Smith, who was the agent for Jonathan Hunt and others, proprietors of the Orange or Poplar Grove tract, that the taxes were unpaid, and if they were not paid, the land described in the deed to Lyon would be sold for their payment. To which Smith replied, that the assignees were the proper persons to pay the tax, and as some of the proprietors had been negligent in paying their proportions, he wished a sale to take place, that their punctuality might be enforced: *Further,*

that the advertising and selling was with the full knowledge and consent of Smith.

As to all other matters alledged, respondent denies all knowledge or participation, or any knowledge of the acts of his co-defendants, save as already stated.

Cleveland answers, that he never had any claim or title to the premises in question, and never pretended to have any interest in the same. In August, 1844, his co-defendant, Lyon, requested him to see that no person trespassed thereon, and if any one was detected, to give information thereof. He denies that he ever detected any one in the commission of such a trespass, or attempted to prevent any one from going on the land, and doing whatever they pleased there; he assumed no management or control over it, and as soon as he ascertained that Lyon's title was disputed, he informed him that he could not consent to act as his agent, and never acted, or pretended to act as such.

It was proved on the part of the complainants, that they were in possession, that Lyon placed Cleveland on the land to control it, and prohibited a person who was at work on the premises by authority, from exercising any control there, and brought a suit against him: *Further*, that he made publication in one or two city papers, that he claimed the land by a certain deed, and prohibited all trespasses, &c. Lyon is reputed insolvent.

The dirt excavated was worth eight or ten cents a cubic yard, and unless removed so as to preserve a level, and with reference to the streets, would seriously injure the property.

The trustees don't act, or interfere with the property, except when they are called on, as by the terms of the trust they are required. The terms of the trust are considered to be terminated, and they would not act if now called on. Each of them in 1841, '42 and '43, had personal property in Mobile, from which three hundred dollars could have been made by levy.

The sale was advertised by Huggins as collector, in the city paper, from 7th January to 7th February, 1842, stating that the balance of the Orange Grove tract unsold, was assess-

ed to McCoy, Norris, and Magee, trustees, and that the tax amounted to \$175 50.

S. Smith testifies, that he paid previous to the day of sale, the taxes of 1841, upon twenty-three of the forty-eight shares of the Orange Grove tract, and has the receipts of George Huggins, by John Pollard, who was deputed and acted as collector of taxes.

H. Barney states, that he paid the tax upon 1-48 to Huggins, for Bacon, Symington and Roberts. S. P. Bullard testifies, that John Bloodgood paid the tax on 4-48 for himself, and 2-48 for Henry Bright. James Hagan proves, that James Magee paid the tax on 4½-48, and John Hagan on 5½-48. Bright's taxes were paid to John Pollard.

The Chancellor was of opinion that the bill was not wanting in equity—that the sale being made after all, or the greater part of the taxes had been paid, and when the trustees to whom the premises had been assessed, had property of which a collection could have been made, the purchaser acquired no title. That relief should be granted to remove the cloud cast upon the complainants' title, and quieting them in their possession—preventing further disturbance, impending waste, and the effect of the wrongful act of the public officer: *Further*, to prevent irreparable injury from multiplicity of suits. To sustain this conclusion, he cited 1 Baldw. Rep. 205-232; 3 How. R. 441.

It was proposed by the chancellor, to stay proceedings until the defendant, Lyon, should institute an ejectment, and try his title at law. But he declined to accept this proposition; whereupon it was adjudged that the injunction be perpetuated, and the sale and conveyance under which Lyon claims be set aside, and the defendant pay the costs.

A. F. HOPKINS, for the plaintiffs in error, insisted, that as it was not alledged in the bill that Lyon put Cleveland in possession of the premises, and brought an action of trespass against a tenant of the complainant, it was not admissible to prove these facts. [1 Ala. Rep. 330; 3 Johns. Rep. 566; 6 Id. 543; 14 Id. 507.]

The allegations against Cleveland are denied by his answer, and there is no testimony to disprove the denial.

Lyon, et al. v. Hunt, et al.

Smith's evidence does not agree with the allegation in the bill, and if it did, could not overbalance the answer. [3 Por. Rep. 473; 1 Ala. Rep. 330.]

Huggins answers, that the taxes were assessed to the three trustees of the complainant—that they had not sufficient personal property within his knowledge to pay them; that he applied to Smith, who seemed to be complainant's agent for payment, which he declined—expressing a wish that the property might be sold. Respondent accordingly sold and conveyed the land in question to the defendant, Lyon. This answer is not denied by Smith's deposition. The effect of this conveyance under the statute is to vest a good title in the purchaser; and the deed is conclusive evidence that the collector did what the law requires before the sale was made. If the facts concluded by the deed were false, the collector is liable to an action for damages at the suit of a party aggrieved. [Clay's Dig. 566, 567; 18 Johns. R. 441; 3 How. Rep. U. S. 462.] But if the deed is not conclusive as to the regularity of the collector's proceedings and the right to sell, it is at least *prima facie* evidence, and must be overbalanced by proof.

It is alledged in the bill that all the taxes upon the land but six forty-eighths had been paid. The State then had the right to sell for the non-payment of the residue, unless the possession of the trustees of a sufficiency of personal property to pay prevented the exercise of such a right. The collector denies that he knew of such property, and there is no evidence that he possessed such knowledge. The bill alleges that the trustees had ceased to be such, and they were of course not bound to pay the taxes, but does not charge that the collector had notice either actual or constructive of the termination of the trust; these trustees were then not bound to pay the taxes. Who were the owners of the six forty eighths of the land is not stated, nor does it appear what was the value of their personal property. Upon the admission that part of the taxes was unpaid, Lyon was jointly interested in the land with the complainants—the bill therefore has no equity, and should have been dismissed.

The proof shows the payment on less than forty-two of the forty-eight shares, and a part of this was paid to Pollard,

not Huggins, the collector. Smith testifies that Pollard was deputed and acted as collector in 1841; but does not state that he was deputed by Huggins, to whom the bill alledges the payment was made. The proof then does not support the allegation. [3 Port. Rep. 483; 2 Ala. Rep. 330; Gresley's Eq. Ev. 9, 10; 3 Johns. Rep. 566; 6 Id. 543; 14 Id. 501.] Bloodgood's payments are stated to have been made to Huggins—Hagan's deposition is too vague to prove any thing, and Barney proves that he paid the tax on one share to Huggins. As no payment is proved by more than one witness to have been made to Huggins, it cannot outweigh his answer.

The witnesses state that they took receipts for the payments they made of taxes, yet these receipts do not accompany the depositions—in their absence the evidence is insufficient. [3 Johns. Rep. 566; 6 Id. 543; 14 Id. 501.] According to the admissions in the bill, the taxes on six shares were not paid—by Lyon's purchase he became the proprietor of these, and could not be excluded from all participation in the enjoyment of the land, as by the decree he is.

In any view, the case is one of a disputed legal right, and equity should not interfere. [6 Ves. Rep. 51; 8 Id. 90; 1 Johns. Ch. Rep. 318; 6 Id. 500; 12 Ohio Rep. 387.] The bill states, and the evidence shows that complainants are in possession, but does not show that either of the defendants committed, or threatened to commit a trespass. If Lyon had committed one trespass and threatened to commit another, the most a court of equity could do, if he was insolvent and a suit at law was brought against him, would be to enjoin the exercise of acts of ownership over the land until a trial at law and the further order of the court.

Sheriffs were made collectors of taxes by a statute passed in 1836. They are agents of the State and counties, and not authorized by the act to delegate their authority. The deputy of a sheriff, in virtue of his appointment as such, is not authorized to collect taxes. [7 Ala. Rep. 100.]

J. A. CAMPBELL, for the defendant, contended that the equity of the bill rested upon well established principles; that it charged acts done, continued and threatened, which

interfered with the complainants' enjoyment of their property, and which showed that the defendant, Lyon, had attempted to exercise rights and an authority far beyond what he is entitled to by law. [4 Mylne & C. Rep. 249.]

When a bill alleges a fact which must be within the defendant's knowledge, he should respond to it directly—if the answer is equivocal, the allegation will be taken as true. [1 Port. Rep. 257; 7 Ala. Rep. 217; 2 A. K. Marsh. Rep. 4, 6; 2 Dana's Rep. 103.] The defendant, Lyon, admits the plaintiff's title, his possession and disturbance, though he does not answer as to circumstances. [3 Paige's Rep. 606.] He admits his insolvency, and the acts of the sheriff, Huggins—the evidence supplies the only other fact that is controverted, viz., the payment of the taxes.

In addition to the ground of equity already stated, the bill discloses others. Insolvency authorizes equitable interposition, when it would not be otherwise granted. [3 Bro. Ch. Rep. 620, 622; 3 Paige's Rep. 213.] So, where there is an effort to deprive one of his freehold under color of legal authority. [Coop. Rep. 77; 1 Swanst. Rep. 250; 7 Johns. Ch. Rep. 315; 6 Paige's Rep. 88; 16 Pick. Rep. 512; Bald. C. C. Rep. 205; 3 How. Rep. U. S. 441.]

The defendant, Lyon, is not charged with a single trespass, but with the destruction of the complainants' property and their exclusion from its enjoyment by repeated acts. This itself authorizes the interposition of the court by injunction. [9 Wheaton's Reports, 842; 5 Pet. Reports, 1, 20, 78; 1 Vesey, Sr's. Reports, 188; 6 Johns. Chanc. Rep. 501.] And it is not necessary to await the commission of the wrong, but equity may be applied to, and a threatened wrong arrested. [2 Atk. Rep. 182; Baldw. C. C. Rep. 232.]

The taxes on forty-two of the forty-eight shares, it is proved were paid. There was no effort to obtain the residue from the trustees; Huggins' answer admits this. These facts are developed by evidence extrinsic of the conveyance under which the defendant, Lyon, claims, and can only be elicited in chancery. The sheriff's deed throws a cloud over the complainants' title, which that court may be called on to remove. [7 Ves. Rep. 16; 13 Id. 581; 17 Id. 111; 6 Paige's Rep. 262; 3 How. Rep. U. S. 441.]

An averment in a bill need only be made according to the legal effect of the evidence by which it is proposed to sustain it. Thus, if a payment was made to an agent, it is enough to charge that the money was received by the principal himself, for such is the legal effect of the payment to the agent.

The chancellor offered to Lyon a trial at law, which he declined accepting, and he cannot now complain that the complainants have not sued him for the trespass.

The answer of Huggins, that Smith desired the sale to be made, is irresponsive to any allegation, unsupported by any evidence, and need not have been disproved. The sale of any portion was without authority, the illegal acts complained of, affect the estate of all the parties, and the disturbance injures the right of all. As the complainants have a common right of enjoyment which has been disturbed, they may well unite in the prosecution of a suit for its protection. [5 Por. R. 43; 4 Cranch's Rep. 403; 6 Wheat. Rep. 119.]

The decisions in New York as to the effect of a tax collector's deed are inapplicable here; for in that State there is a statute which makes such a deed conclusive evidence. [1 Rev. Stat. N. Y. 411, 412.]

COLLIER, C. J.—The interference of courts of equity in restraint of waste was originally confined to cases founded in priority of title; but at present, the jurisdiction has been enlarged to reach cases of adverse claims and rights not founded in priority; as, for instance, to cases of trespass, attended with irreparable mischief. [2 Story's Eq. 200.] The interposition by way of injunction in cases of waste, may be referred to the broadest principles of social justice. It is exerted where the remedy at law is imperfect, or is wholly denied; where the nature of the injury is such, that a preventive remedy is indispensable, and should be permanent. [Ib.] Even in cases of tenants in common, courts of equity will interfere where the party committing the waste is insolvent; or where the waste is destructive of the estate, and not within the usual legitimate exercise of the right of enjoying it. [Id. 199.] In some cases, the jurisdiction is maintained in order to prevent multiplicity of suits. [1 Story's Eq. 82,

491 to 493. See further as to the remedy in equity, 1 Hen. & M. Rep. 18; 1 Monr. Rep. 65.] An injunction to stay waste, it has been decided, will be granted, though there be no suit pending in a court of law, and though no action can be maintained at law against the tenant. [1 Johns. Chancery Rep. 11.]

In *Livingston v. Livingston*, 6 Johns. Ch. Rep. 497, it was said; that "*Lord Eldon* suggested the propriety, of extending the injunction to trespasses as well as waste, on the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance. The distinction on this point, which was carefully kept up by *Lord Hardwicke*, was shaken by *Lord Thurlow*, in *Flamany's* case respecting a mine, and seems to be almost broken down and disregarded by *Lord Eldon*. This protection is now granted in the case of timber, coals, lead ore, quarries, &c.; and 'the present established course,' as he observed in *Thomas v. Oakley*, 18 Ves. 184, 'was to sustain the bill for the purpose of an injunction, connecting it with the account in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages.'" So in *Field v. Beaumont*, 1 Swa. Rep. 208, the Lord Chancellor remarked that his "court was now in the habit of granting injunctions in cases of trespass, as well as of waste." But is said not to be the general rule that an injunction will lie in a marked case of trespass, where there is no legal remedy for the intrusion. There must be something particular in the case, so as to bring the injury under the head of quieting the possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy. [1 Madd. Ch. Rep. 150.] Where this appears, the jurisdiction of equity is defensible. [6 Joh. Ch. Rep. 497; 1 Paige's Rep. 99; 6 Ves. Rep. 147; 7 Id. 305; 10 Id. 290; 15 Id. 138; 16 Id. 128; 17 Id. 110, 128, 281.]

In *Hart & Hoyt v. Mayor, &c. of Albany*, 3 Paige's Rep. 213, the chancellor observed that the cases in which his court had interfered to prevent a mere trespass, have been those in which the complainant had been in the previous undisturbed enjoyment of the property under claim of right, or where from the irresponsibility of the defendant, or otherwise, the

complainant could not obtain relief at law. And in the *M. & H. Railroad Co. v. Artcher*, 6 Paige's Rep. 88, it was asserted that chancery has an undoubted right to interfere by injunction where public officers are proceeding illegally and improperly under a claim of right, or where the exercise of such a jurisdiction is necessary to prevent a multiplicity of suits at law; and this, although the complainants might have lain by and permitted the defendants to proceed, and then have sued them at law to recover satisfaction for the injury. This principle is re-affirmed in *Oakley v. Trustees of Williamsburgh*, Id. 264-5. In that case, assessments were made upon certain town lots of the complainant for the expenses of the proceedings to alter the gradations of the streets, and the court was of opinion, that although they might be so far void as not to affect their legal title to the lots, yet as they would of themselves be a cloud upon that title, and must necessarily diminish the value, an injunction should be granted to restrain the defendants from proceeding with the proposed alteration of the former gradation of the street as originally established. It was added, that as chancery sometimes exercises its jurisdiction for the purpose of removing a cloud from the complainant's title to real estate, it may also in a proper case, interpose its authority to prevent the illegal act from which such a cloud must necessarily arise.

In *Pettit v. Shepherd*, 5 Paige's Rep. 501, it was held that an injunction will be granted at the suit of the true owner of land to restrain the sale of it, under an execution against the lands and tenements of a third person. "The jurisdiction of this court," said the chancellor, "to set aside deeds and other legal instruments, which are a cloud upon the title to real estate, and to order them to be delivered up and canceled, appears to be now fully established. [See *Ward v. Ward*, 2 Hayw. Rep. 226; *Leigh v. Everhart's Ex'rs*, 4 Mon. Rep. 380; *Hamilton v. Cummins*, 1 Johns. Ch. Rep. 517; *Apthorp v. Comstock*, 2 Paige's Rep. 482; *Grover v. Hugell*, 3 Russ. Ch. Rep. 432.] And if a court of chancery would have jurisdiction to set aside the sheriff's deed which might be given on a sale, and to order the same to be delivered up and canceled, as forming an improper cloud upon the complainant's title to his farm, it seems to follow as a necessary

consequence, that the court may interpose its aid to prevent such a shade from being cast upon the title, when the defendant evinces a fixed determination to proceed with the sale." *Lord Eldon*, in *Hayward v. Dimsdale*, 17 Ves. Rep. 111, declared his opinion that there is a jurisdiction in equity to order a deed forming a cloud upon the title to be delivered up, though that deed is void at law; but he admitted that the contrary had been held by *Lord Thurlow*, and *Lord Loughborough* had held the contrary in 3 Brown's Chan. Rep. 12, and in 1 Ves. Jr. Rep. 50. The same doctrine is maintained in *Jackman v. Mitchell*, 13 Ves. Rep. 581, and *Carroll v. Safford*, 3 How. Rep. U. S. 463. The jurisdiction exercised in such cases, says Mr. Justice Story, is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet*; that is, for fear that such agreements, securities, deeds or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may throw a cloud or suspicion over his title or interest. "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose. If it is a deed, purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title." This jurisdiction, continues the same learned author, is not confined to cases, where the instrument having been executed, is void upon grounds of law and equity—"it is applied even in cases of forged instruments, which may be decreed to be given up, without any prior trial at law on the point of forgery." The old course used to be, if the validity of the instrument was contested, to direct an issue or a trial at law to ascertain the fact: but this, though the common practice was a matter in the sound discretion of the court; as the determination of a jury upon the point was not indispensable. At present, a more convenient course, it is said, seems to prevail, for the court itself to decide the point, without sending the matter to be ascertained at law by a jury; unless the contradictory character of the evidence, or the want of clearness in the proofs make it advisable to direct an issue. [2 Story's Eq.

4-13.] The same author remarks, that where the illegality of the deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity to direct it to be canceled or delivered up, would not seem to apply; for in such case lapse of time cannot deprive the party of his full defence; nor can such a paper throw a cloud over his title, or diminish its security; nor can it be used as a means of vexatious litigation, or serious injury. [Id. 11.]

By a comparison of the allegations of the bill with the law as we have stated it, we think it perfectly clear, that the bill states a case proper for equitable interposition. True, it does not charge the defendant, Lyon, with the actual commission of waste, but it affirms, that trespasses and waste are threatened, that preparations are being made for their commission, and that by the acts of Lyon, and others acting avowedly under his authority, the complainants are disturbed and are likely to be still more seriously interrupted in the enjoyment of their property. That the acts charged to have been committed and threatened would most probably produce such a result as the complainants apprehend, we think cannot be seriously questioned. This being the case, and Lyon being insolvent, the preventive interference of chancery may be sustained upon the ground that the injury to the complainants' property would be otherwise irreparable. To authorize an injunction to issue in such case, it is not necessary that the acts threatened should have been committed—if the party insists upon his right to do them, and especially if he makes advances towards their commission, it is quite sufficient. [2 Atk. R. 183; *Casey v. Holmes, Bott & Earle*, 10 Ala. Rep. 776.]

The validity of the deed from Huggins as collector of the taxes for Mobile county, has not been drawn in question, for any defects apparent on its face, and it may therefore be conceded, that it is *prima facie* valid, if its recitals are sustained. Upon this hypothesis it may be assumed, that if it is not sufficient to divest the complainants' interest in the property in question, it at least throws a cloud over their title—is calculated to impair the market value of the estate, and will prevent a sale at its fair value. Under such circumstances, no

prudent man would be inclined to purchase. The bill alleges that complainants are in possession, and upon an objection of the want of equity, this allegation must be taken to be true. This being the case, the defendants cannot maintain an action at law to test the validity of the title of Lyon, and the citations we have made, very satisfactorily establish the jurisdiction of a court of chancery to remove the cloud, and cancel his deed. [Bacon v. Conn, 1 S. & Marsh. Ch. R. 348.]

We are now brought to consider the validity of the sale under which Lyon claims, and the deed consequent thereon. By the act of 1815, in connection with that of 1821, it is enacted, that all lists of taxes shall be considered as having the force and effect of an execution; and it shall be lawful for all assessors and collectors of taxes, from and after the first day of September, in each year, to proceed to make distress and sale of the goods and chattels, lands and tenements of all persons in arrear for taxes. Where the delinquent has no goods and chattels within the county, then his lands and tenements within the same, or so much thereof as will be sufficient to pay the amount of taxes due from him, together with costs and charges, may be sold by the collector; "*Provided*, that the collector shall have given in the nearest newspaper published in this state, in the case of residents within the same, at least three months notice, and in the case of non-residents, at least six months notice of the time and place of sale." "Which notice shall contain a particular description of the land for sale; on what water course it is, and by what lands the same is bounded; and to whom the same was granted, or by whom the same is now owned or claimed." "There shall not be sold in one lot, more than three hundred and twenty acres of land; but if one lot shall not sell for the amount of taxes due from the delinquent, together with all costs and charges that shall have accrued thereon, the collector shall sell as many lots, or parts of lots, as shall raise the full amount due; in no case shall the collector sell any more land than shall be sufficient to raise such sum as shall be due.

The same statute directs that every collector of taxes who shall sell any real estate to satisfy any tax imposed by law-

ful authority, shall execute to the purchaser thereof, a deed of conveyance immediately; "which deed shall be good and effectual, both in law and equity," and shall recite, "that the real estate thereby conveyed was sold for taxes, and the consideration;" but such deed, though it may be proved, shall not be recorded, until the expiration of one year from its date; within which time the person whose estate has been sold, may redeem the same. [Clay's Dig. 566-7, § 50, 53.] It is provided by the act of 1821, that "the assessor shall deliver to each individual whose property he assesses, a concise statement of the property assessed, and the amount; which he shall date and sign." [Id. 554, § 36.] The act of 1827, makes it the duty of the assessor to value town property in case of the neglect or refusal of the proprietor to list the same, and of the collector to collect the amount of tax due thereon, in the same manner as if the tax had been given in by the owner. It is also provided by the same statute, "that the collectors of taxes in the several counties shall, at the time, and in the manner prescribed by law, make distress and sale of the goods and chattels, lands and tenements of all delinquents in making returns of taxable property, or in payment of taxes." In cases of taxes assessed, as directed by the act, on lands or town lots, to which a complete title has not been made, (if no other property can be found to satisfy it,) the collector is directed to offer the same for rent, having first given thirty days notice, by advertisement at the court house door, and at two other places in the county. [See the act, § 3, 9, 12; Clay's Dig. 564, § 38; 567, § 55.] This enactment does not modify the act of 1815, as it respects the proceedings essential to the sale of real estate for the sale of taxes. The ninth section, except so far as it is declaratory of the act of 1815, relates expressly to lands or town lots "sold under the authority of the United States, previous to the first day of September, 1819." This is conclusively indicated, not only by the section referred to, but by the eighth and eleventh sections, and upon this hypothesis we will consider the case.

In *Williams v. Peyton's lessee*, 4 Wheat. Rep. 77, it was said that the authority conferred upon a collector to sell lands for the non-payment of the direct tax, "is a naked power,

not coupled with an interest ; and in all such cases, the law requires, that every pre-requisite to the exercise of that power, must precede its exercise ; that the agent must pursue the power, or his act will not be sustained by it." The deed of the collector is not even *prima facie* evidence, that the pre-requisites prescribed by law have been complied with ; but the party claiming under it must show positively, that they have been complied with.

It is easy for the purchaser, said the court, to show that the collector has posted up the notifications as required by the statute, but very difficult to show that he has not. He may readily prove that a personal demand was made on the person liable for the tax, "but the negative in many cases would not admit of proof. No greater hardship is imposed on the purchaser to require him to prove the publication in a gazette, than to require him to prove that a naked power of attorney, in a case in which his deed has been executed by an attorney, was really given by the principal. "But to require from the original proprietor proof that these acts were not performed by the collector, would be to impose on him a task always difficult, and sometimes impossible to be performed." [See also, 4 Cranch's Rep. 403 ; 9 Id. 64 ; 1 Scam. R. 335 ; 1 Bibb's R. 295 ; 5 Mass. Rep. 403 ; 4 Dev. & Bat. R. 363.] A purchaseer of lands which have been sold for the non-payment of taxes cannot defend his possession by the production of the collector's deed, and proof of its execution, but he must also show that the lands were listed ; that taxes were due and unpaid, and that the lands were regularly advertised for sale. "In deciding on tax titles, great strictness has always been observed, and less latitude given than in proceedings on judgment and execution. A collector who sells lands for taxes, must act in conformity with the law from which he derives his power, and the purchaser is bound to inquire whether he has done so, or not. He buys at his peril, and cannot sustain his title, without showing the authority of the collector, and the regularity of the proceedings. In these cases the maxim *caveat emptor* applies." [3 Ohio Rep. 232 ; see also, 2 Ohio, 378 ; 3 Yeates' Rep. 284 ; 2 Id. 100 ; 13 Sergt. & R. Rep. 208 ; 4 Dev. & Bat. Rep. 386 ; 5 Wheat.

Rep. 116 ; 6 Id. 119 ; 1 Yeates' Rep. 300 ; 3 Monr. Rep. 271.]

In an *ex parte* proceeding, as a sale of land for taxes, under a special authority, great strictness is required. To divest an individual of his property against his consent, every substantial requisite of the law must be complied with. No presumption can be raised in behalf of a collector who sells real estate for taxes, to cure any radical defect in his proceedings ; and the proof of regularity devolves upon the person who claims under the collector's sale. [4 Pet. R. 349.] To the same effect is *Avery v. Rose*, 4 Dev. Rep. 549, in which it was also held, that the collector's deed must be made at the time directed by the statute. In the *Lessee of Watt v. Gilmore*, 2 Yeates' Rep. 330, lands were assessed and sold for the non-payment of taxes, as the property of A. G. and J. G., but were advertised as the property of C. G. and company : *Held*, that the variance between the advertisement, assessment and deed, was fatal to the sale and operation of the deed. So it has been decided, that under the eighth section of the act of 1812, to amend the act for the incorporation of the city of Washington, a sale of unimproved squares, or lots in the city, for the payment of taxes is illegal, unless such squares and lots have been assessed to the true and lawful proprietor thereof ; and the advertisement of sale must contain a particular statement of the amount of taxes due on each lot separately. [8 Wheat. Rep. 681.] And if land is assessed in the name of A. when in fact it belonged to B., a sale for the non-payment of taxes will not, though a deed has been executed, and legal forms have in other respects been adhered to, convey a title to the purchaser. [1 Bibb's Rep. 295.] In fact it is indispensable to the regularity of a sale, in such case, that the assessment of the tax should have been made strictly in conformity to law. [1 Tyler's Rep. 305 ; 14 Mass. Rep. 177 ; 1 Pick. Rep. 482.] Where the statute requires the notice shall be given to the occupant, or proprietor of the land, previous to the sale for the non-payment of the tax, unless such notice is given, the deed of the collector passes no title to the purchaser. [7 Wend. R. 148 ; 15 Id. 348 ; 16 Id. 550.]

If land is sold for the non-payment of divers taxes, one of which is illegal, and the rest legal, the sale is void *in toto* [1 Greenl. Rep. 339; see also, 15 Mass. Rep. 144.] So where a sheriff sells land for the taxes of two years, when he had a right to collect only those due for the last year, the sale is void, and his deed vests no title in the purchaser. [3 Dev. Rep. 432.] And in *Jones v. Gibson*, Taylor's N. C. Term Rep. 480, the sheriff sold an entire tract of land, for the payment of the taxes assessed thereon, although the taxes for one third of the tract had been paid by a person who claimed to be the proprietor of that portion of it, and it was held that the sale was void. So where a sale of land was made for taxes, after a legal tender to the collector, by a part owner, of all that was due, no title passed to the purchaser. [3 Hawks. Rep. 283.]

A statute of New York required a tax list to be made out, "containing the names of all the taxable inhabitants residing in the district at the time of making out the list, and the amount of tax payable by each inhabitant, set opposite his name;" and further directed, that a warrant issue, which "shall command the collector to collect from every person in such tax list or rate bill named, the sum therein set opposite to his name." *Held*, that where a farm is owned, and actually possessed by the widow and heirs of a person deceased, the designation of such owners in a tax list, and warrant for the collection of the tax, as "the widow and heirs of A. B. deceased, is a sufficient compliance with the directions of the statute to justify the collector in executing the warrant. [10 Wend. Rep. 346.] And in the *Lessee of Massie's Heirs v. Long and others*, 1 and 2 Ohio Rep. 412, it was held that the assessment of a tax upon a "part of a lot, or one acre of a lot," without quantity or location, in the one case, or without location in the other, is too vague and indefinite to authorize a sale of any part, or in any place. It has been decided under the tax laws of Illinois, that a deed to the purchaser of land sold for taxes, must show that the land was sold for the taxes of a particular year, and if it is ambiguous in this respect, it cannot be explained by parol testimony. [1 Gilm. Rep. 26.]

The earlier legislation of Illinois, in respect to the sale of

lands for a default in the payment of taxes, seems to have been modified, so as to make the deed of the auditor, (the officer authorised to convey,) evidence of the regularity, and legality of the sale, until the contrary shall be made to appear. [1 Gilm. Rep. 631 ; see also, Id. 131.] And although by a statute of New York, it is declared, that where lands are sold in consequence of the non-payment of taxes, and a deed is regularly executed, such deed "shall be conclusive evidence that the sale was regular," it has been held, the conveyance may be defeated by proof of the fact, that the tax for which the land was sold, was paid before the sale. It was said, that "the statute declares that the conveyance shall vest an absolute estate in fee simple in the purchaser ; which it does not, if the tax had not been paid ; but if it has been paid, then no estate passes by the sale, for the statute intended to divest the title of the former owner, for non-payment of the tax, and for that only ; and it must be so construed." The purchaser buys subject to being defeated if the tax has been paid, and if his title is invalidated for that cause, he must look to the state for the relief which such a case requires. [18 Johns. R. 441.]

We might, perhaps, have saved ourselves the labor of thus multiplying citations on this branch of the case, by merely referring to a decision of our own, in which it was held, that to sustain a sale of real estate for the non-payment of taxes by the marshall and collector of the city of Wetumpka, the purchaser must show that every pre-requisite to the regularity of such sale had been strictly complied with. [5 Ala. R. 433.] But as the opinion, in that case, though clearly and satisfactorily reasoned, did not go into an elaborate examination of the question, we have thought altogether proper on the present occasion, to fortify the conclusion there expressed. It is important to the State, as well as to individuals, that the law upon this point should be understood, and this must be our apology for having thus extended this opinion.

Our statutes do not declare that a sale and conveyance, such as we are considering, shall operate *proprio vigore*, it merely provides that the collector's "deed shall be good and effectual, both in law and equity." By this we understand, that it shall pass the title to the vendee, if the sale was made

in obedience to the directions of the law, and was authorised by it—not that the vendee shall be released from the *onus* of proving every pre-requisite to the regularity of the sale. This being the case, the citations from 4 Wheaton's Reports, 3 Ohio Reports, and others of a kindred character, are directly in point. By these we have seen, that a tax collector's deed is not even *prima facie* evidence in favor of the purchaser's title, but must be sustained by proof of extraneous facts.

The notice we have taken of our statutes, and the adjudications upon kindred enactments elsewhere, very clearly indicate that the proceedings of the collector, Huggins, 'under whose deed Lyon claims, were eminently irregular. The assessment does not particularize the land, by stating what portion of the Orange Grove tract was assessed. It could not have been ascertained, (if at all,) without reference to deeds and writings, as well as oral testimony, to which access could most probably be obtained only by time and industry. It does not appear whether the assessment was made in the ordinary mode by the proprietors of the estate, or by the collector, upon his neglect or refusal to give it in; nor is it shown that the collector delivered to the proper persons a written statement of the tax assessed. It may be well questioned, whether it is proved that the persons liable to pay the tax had not sufficient property in Mobile county that could be sold for its satisfaction. Is it certain that the lands were assessed to the proper persons? It is obvious from the proof, that the greater part of the sum assessed was paid by the real proprietors of the property, or their agents, even previous to its having been advertised for sale.

Again: The advertisement by the collector of the time and place of sale, is as general as the assessment, and proposed to sell "the balace of the Orange Grove tract remaining unsold," to pay the entire sum assessed, without noticing the payment of any part of it; nor can the land to which it refers be identified, and located, otherwise than by reference to extraneous written, and perhaps verbal evidence. And to this it may be added, that it not only does not appear that the sale was advertised for three months, but it was proved

by the positive testimony of one witness, that the advertisement first appeared on the 7th of January, 1842, and the sale was made on the 7th of February next thereafter—being thirty days. It is unnecessary to inquire whether any particular in which we have noticed the proof to be wanting, constitute so many legal objections to the title of the defendant, Lyon, since it is perfectly clear from the terms of the statute, that the two last stated are substantial defects in the advertisement, and are fatal to his pretensions. The affirmation in the answers of Lyon and Huggins, that the sale was advertised *according to law*, are too general and indefinite to entitle them to be considered a direct denial of the allegation, that the notice of the sale was published for thirty days only. These defendants do not state what they consider a legal advertisement—it may be, they consider such as was published, and for the period proved, was a compliance with the statute. Be this as it may, upon principles of reason and analogy, the opinion of a defendant generally expressed, that a matter was transacted pursuant to the law, cannot outweigh the positive declarations of a witness, who states the facts specially, which show that the law was disregarded.

We need not consider any other question discussed in this case, as the result cannot be changed by any conclusion we might attain in respect to them. The consequence is, that the chancellor rightly perpetuated the injunction, and set aside the sale and conveyance upon which the defendant, Lyon, rested his claim—the decree is therefore affirmed.

POWELL v. ALLRED.

1. When land is conveyed by a deed which is not registered, but the purchaser enters and holds under the deed for several years, after which a stranger enters on the possession and holds without any connection with the title, these facts are sufficient notice to prevent a lien from attaching to the land by a judgment obtained against the vendor of the land six years after his sale and conveyance, and a purchaser under the judgment obtains no title, being charged with notice by the outstanding possession existing at the time of his purchase.

Writ of Error from the Circuit Court of Jefferson.

THE action is trespass *qu. fre.* to try titles to a tract of land described in the declaration. At the trial, both parties deduced title from the same source, one Tannehill. The plaintiff, Powell, showed a judgment in the circuit court of Blount, rendered in 1839 against Tannehill, and a sale by virtue of an execution thereon, as well as the sheriff's deed, executed 5th November, 1845. The defendant, Allred, offered a deed from Tannehill to one Gillaspie, executed 31st December, 1833. The plaintiff objected to this, on the ground it never had been recorded, but the court, notwithstanding, admitted it. The defendant then proved a deed from Gillaspie to one Esther W. Harrison, and also proved she was the wife of one Greenberry H., who for some years before the date of the deed, had left this State and gone to Texas. The defendant also proved, that at the time of the execution of the deed by Tannehill to Gillaspie, the former abandoned the possession, and the latter took possession under the deed, and remained in possession some four or five years, and until the execution of the deed to Mrs. Harrison. At that time another Gillaspie went into possession, and so remained for some four or five years, when the defendant entered, and has continued in possession ever since.

On this state of proof, the plaintiff asked the court to

charge the jury, that if the deed from Tannehill to Gillaspie was not recorded before the rendition of the judgment under which his title to the land was sold, and the plaintiff had no actual notice of the deed, then the verdict should be for the plaintiff. This was refused, and the charge given, that if Tannehill went out of possession when he executed the deed, and Gillaspie entered under the deed and so remained for four or five years, and that Tannehill had never since been in possession, this was constructive notice, and the deed good, although unrecorded.

The plaintiff excepted to the several rulings of the court, and they are now assigned as error.

ERNEST, for the plaintiff in error, cited 8 Ala. Rep. 866; 4 Rand. 174; 3 Ala. Rep. 458; 4 Ib. 263.

W. S. MUDD, contra, cited *Davis v. Blunt*, 6 Mass. R. 487; *Jackson v. Town*, 4 Cowan, 599; *Tuttle v. Jackson*, 6 Wend. 213; *Jackson v. Post*, 15 Ib. 593; *Harris v. Carter*, 3 Stew. 232; *Morgan v. Morgan*, Ib. 383; *Fenno v. Sayre*, 3 Ala. Rep. 471; *Scroggin v. McDougald*, 8 Ib. 381.

GOLDTHWAITE, J.—In *Daniel v. Sorrells*, 9 Ala. Rep. 436, the precise question decided was, that the title of the sheriff's vendee was superior to that of a previous purchaser from the judgment debtor in consequence of the neglect to register his deed within six months from its execution, or before the judgment lien attached. We also held, that notice to the sheriff's vendee of the previous deed from the debtor, did not render his title defective, as it was not shown the creditor himself had notice. We arrived at the conclusion, that a creditor was as much within the protection of the registration acts as a purchaser, not because unregistered deeds are expressly declared void as to creditors, but because the later enactments speak of creditors and purchasers as having the same rights, though the object of those enactments was chiefly to open the time for registration. To carry construction further, and hold that creditors are placed on a different footing than purchasers, would in our judgment be without warrant.

In the case before us now, it will be seen the judgment debtor, some six years before the judgment was rendered, had sold the land in question and parted with the occupancy; after this, the land was held under his deed for some four or five years. The deed however was never registered, nor is it shown that those in possession at the time of the judgment or of the sale under it, are connected with title made by the unregistered deed, although at both these periods the land was occupied by persons having no connection with the judgment debtor. The question is, are these circumstances, or any of them, constructive notice to the plaintiff of the unregistered deed.

We have previously said that there was no warrant by our statutes to put creditors on a different footing from purchasers, and it is such of the latter only as are so *bona fide* and without notice, that the statute protects. Actual notice is not pretended, but the settled law of this, as of most other courts, that possession under the unregistered deed, is constructive notice sufficient to satisfy the terms of the statutes. [Scroggins v. McDougald, 8 Ala. Rep. 381, and cases there cited.]

It does not appear in this case that possession was held under the unregistered deed, though it is clear it was not held under the judgment debtor. The fair inference is, the party in possession was a mere intruder on the estate of Mrs. Harrison; and thus the question is narrowed to the inquiry whether such a possession is notice to the plaintiff, whether we consider his rights as a judgment creditor, or as a *bona fide* purchaser under the judgment debtor, through the medium of the sheriff's sale.

We have been unable to find any decision bearing directly on this point, but on principle, we cannot perceive why the possession of a mere trespasser will invest a judgment creditor with rights, which he could not have if the purchaser under the unregistered deed had retained possession. If the present defendant has wrongfully entered, why should that produce the effect to defeat the title of Mrs. Harrison? It is impossible for the most vigilant owner of lands, if he resides at a distance from them, to prevent the unauthorized intrusion of others, and it would be a most severe penalty, if his

omission of vigilance could enable the creditor of a former owner to take advantage of this to sell the land. So, too, the circumstance that a judgment is obtained and the land sold during the continuance of such an intrusion, cannot in our judgment invest the creditor or purchaser with other rights than he would have against the rightful possessor. It is the well settled rule of the English courts as well as our own, that possession out of the vendor and held by another is sufficient to put a purchaser on the inquiry. When he has sufficient information to lead him to a fact, he shall be deemed to know such fact. [Atkinson on Marketable Titles, 573; Morgan v. Morgan, 3 Stew. 383; Scroggin v. McDougald, 8 Ala. Rep. 381.] If inquiry had been made of the person in possession, it is highly improbable it would have resulted in any thing but complete information; and, although the rule just referred to is usually stated in connection with tenancies and equitable titles, we do not doubt its application to all cases where there is an actual possession held by any other person than his whose title is purchased, even if that possession is by a mere intruder.

The statutes of registration were intended to prevent *bona fide* creditors and purchasers from being injured by secret conveyances not discoverable by the exercise of ordinary diligence; but to extend them so as to authorize either creditor or purchaser to shelter himself, under the pretence of having been deceived, when the person whose title he claims to have changed by a lien, or from whom he purchases, has been out of possession for more than thirteen years, and when, during all that time, the land has been possessed by others not claiming a title for him, would in our judgment be repugnant to the principles which produced these enactments.

We think there was no error in the ruling of the circuit court. Judgment affirmed.

STOKER, ET AL. V. YERBY.

1. Detinue will lie by the trustees and deacons of a religious society, to recover a deed which they had deposited with the defendant, and which he refused to re-deliver.
2. One to whom, in common with others, a deed is made as a trustee of a religious society, is seized to the use of the society, and has not such an interest in the land as would authorize him to withhold the deed from those from whom he had received it.

Error to the County Court of Tuscaloosa.

DETINUE for a deed conveying land.

The declaration states, the plaintiffs, as deacons of the Baptist church, established at Bethel meeting house, and successors, as such deacons, of Castleton Lyon, John Yerby, and Wiley McGee, formerly deacons and trustees of said church, complain of John Yerby, &c.—for that the said plaintiffs, on the 24th April, 1845, at, &c., delivered to the defendant, a certain deed, to wit, &c. (describing the land therein conveyed,) which conveyance it alledges, was made for the purpose of erecting a house of worship of Almighty God, of great value, &c. to wit, of the value of \$1,000, to be delivered to the plaintiffs on request. Yet, although often requested, &c., concluding with the common breach.

The second count differs from the first, only in alledging that they lost the deed out of their possession, and that it came to the possession of the defendant, and that he refuses to deliver it.

To this declaration the defendant demurred, and the court sustained the demurrer. This is the error assigned.

PORTER, for the plaintiff in error.

The delivery was enough to sustain the action. [1 Arch. N. P. 287.] Or, right of possession without delivery. [Ib. 287.]

A grant to use of a church not incorporated, grantor stands seized to use. [D. Church v. Veder, 4 Wend. 494.] And trustees *de facto* of a church, not incorporated, may maintain an action. [Green v. Cady, et al. 9 Wend. 414; People v. Russell, 9 Johns. 147; 1 Chitty's P. 8, note 10; Jef. Ins. Co. v. Cothral, 7 Wend. 72.]

The power of a successor, in such a case, arises as incident, *ex necessitate*. [1 Cowen, 679.]

MARTIN & HUNTINGTON, contra.

This suit was brought by the plaintiffs as *successors*, &c. to recover a deed, &c.

A demurrer was filed and sustained to the plaintiff's declaration, on the ground that the plaintiffs are not *incorporated*, and could not sue as *successors*, &c. To sustain the opinion of the court below, we rely upon Earnst v. Battle and others, 1 John. Cas. 319; Bumpass v. Richardson, 1 Stew. 16; Ewing v. Metlock, 5 Porter, 82; 2 Ala. R. 699.

ORMOND, J.—To maintain *detinue*, it is not necessary that the plaintiff should have the absolute property in the thing sued for, a special, or qualified property, as that of a bailee, is sufficient against a wrong doer. [Arch. N. P. 286.]

We understand the declaration to alledge, that the plaintiffs, as deacons and trustees of the Baptist church, established at Bethel meeting house, were possessed of a certain deed, for two acres of ground, on which the church has been erected, that they delivered the deed to the defendant, to be re-delivered to them on request, and that although requested, he refuses to re-deliver it. The second count varies from the first only in charging that the deed came to the possession of the defendant by finding.

It is obvious that no question of title is presented here; it is the case of a bailee against a wrong doer. It is however insisted, that the declaration shows that the defendant has the right to the possession of the deed. The deed is described

as having been made by William H. Terrell, to Castleton Lyon, Wiley McGee, and the defendant, as deacons and trustees of the Baptist church established at Bethel, in Tuscaloosa county, and their successors in office, upon trust, that the grantees should hold the land, for the purpose of erecting thereon houses suitable for the worship of Almighty God, for the accommodation of the Baptist society, &c. It is obvious that the title is merely vested in these persons, without any beneficial interest, and that they are seized to the use of the Baptist society of Bethel meeting house. [Reformed Dutch Church v. Veeder, 4.Wend. 494.] The defendant therefore had not such an interest in the property conveyed by the deed, as would authorize him to detain it against the acting trustees of the church, from whom he had received it, and who were entitled to the possession, as deacons and trustees of the church.

Whether the plaintiffs could maintain this action, as the present deacons and trustees, and successors of the defendant and others, to whom the possession of the deed was delivered, and without ever having had possession themselves, is a question not presented on the record, by the declaration.

Let the judgment be reversed and the cause remanded.

STRANGE, ET AL. V. WATSON.

1. Where a party purchased land for which he executed his several notes, promising to pay the purchase money at different periods, and died; his administrators paid one of the notes, and then by agreement with the vendor rescinded the contract, stipulating to renounce the benefit of it, if the vendor would deliver up the unpaid notes, which was done; afterwards at the request of one of the administrators (representing that the judge of the orphans' court desired it) the vendor wrote a receipt on these notes, acknowledging that they had been paid to him; but it did not appear that

either the vendor or administrator intended to practice a fraud, or that the receipt had been used for an improper purpose: *Held*, that the receipts did not conclude the vendor from showing the circumstances under which they were given, and that no money was paid to him by the administrators.

2. Upon a bill charging a contract for the purchase of land, alledging the payment of the purchase money, and praying that the title to the land may be vested in the vendee or his heirs, the court is not authorized to render a decree in favor of the complainants; although it is alledged that the defendant fraudulently refuses to comply with his contract; and in addition to the special prayer, there is a prayer for general relief.
3. If the complainant mistakes the relief to which he is entitled, in his special prayer, he may have the appropriate redress, under the prayer of general relief; provided, that relief is such as is agreeable to the case made by the bill: but the court will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another.
4. Where the complainant doubts his title to the relief he wishes to pray, the bill should be framed with a double aspect, so, if the court should decide against him in one view of the case, it may afford assistance in the other.
5. By an agreement between the vendor of land and the administrators of the vendee, a contract of sale between the former and the intestate was rescinded after one of several notes for the purchase money was paid, and the unpaid notes were delivered to the administrators: *Held*, that the heirs of the intestate could not compel the vendor by suit in equity to perfect their title, unless they would pay the residue of the purchase money—the vendor asserting that upon such payment he would perform his contract with their ancestor.

Writ of Error to the Court of Chancery sitting at Montgomery.

THE plaintiffs in error alledge in their bill that they are the heirs of Welborn D. Westmoreland, deceased, who died in Macon county, intestate, in the year 1836, and that their intestate purchased of the defendant in the same year in which he died, certain lands particularly described, situated in the county of Montgomery—all which were then in a high state of improvement, with buildings thereon of great value. At the time of the purchase, the intestate paid to the defendant one hundred dollars, and made and delivered to him his several promissory notes for the sum of eighty-nine hundred dol-

lars, the residue of the purchase money. Simultaneously with the making of the notes, the defendant executed and delivered to the intestate his bond in the penal sum of eighteen thousand dollars, or some other large sum, by which he bound himself, his heirs, executors, &c. to make good and sufficient titles to all and every part of these lands to the intestate, his heirs, executors, &c. as soon as the intestate should thereafter pay and satisfy the notes aforesaid.

By the terms of the contract, the intestate, his heirs, &c. was to take possession of the lands, on or about the first day January, 1837, but the defendant would not permit the complainants to enter upon and occupy the lands—still retaining them in his possession when the bill was filed.

Administration of the intestate's estate was duly granted by the orphans' court of Macon, to Seaborn J. Westmoreland and Elizabeth Westmoreland, and in the regular course of their administration, one or both of them "took up and satisfied" the notes given by the intestate to the defendant for the purchase money. Thereupon the defendant was bound to make titles to the complainants, and account with them for the rents and profits of the lands from the first day of January, 1837; the annual value of which is two thousand dollars.

The defendant's bond for titles was taken possession of, by the administrator, Seaborn J., who, as the complainants are informed and believe, fraudulently placed, or caused the same to be placed, in the hands of the defendant; and it is now retained or has been destroyed by the latter, that he may hold and enjoy the lands, and defeat complainants' title thereto. It is alledged that this administrator has removed beyond the limits of the State.

Complainants pray that the defendant may be compelled to produce the bond for titles, if under his control, or if it has been destroyed, that he make known its contents; that the title to the lands which the defendant obliged himself to convey be vested in the complainant; that the defendant be compelled to account with them for the rents and profits since the first day of January, 1837, and that he be adjudged to pay them the same, together with the damages they have sustained by the failure to perform his contract for the sale

and conveyance of the lands: *Farther*, that such other relief in the premises as the nature and circumstances of the case require, be granted.

The defendant answered the bill, admitting the sale of certain lands to the complainant, which he described according to the government surveys, and points out a discrepancy in the description of the bill. The improvements were one hundred and thirty acres of cleared land, with certain buildings, the locality and character of which is designated, and alledged not to be of great value. Defendant admits that he received of the intestate one hundred dollars at the time of the sale, and his three several notes, one for \$2,900, due 25th December, 1836, or the 1st January, 1837; another for \$3,000, due twelve months thereafter; and a third for \$3,000, due twelve months after the maturity of the last. He also admits that at the time he received the notes, he executed to the intestate a bond, conditioned to make titles to the lands when the last of the three notes should be paid to him.

Defendant denies that by the terms of the contract between intestate and himself, the former was to go into possession of all the land purchased, but defendant was to retain the possession of about eighty acres of the cleared land, until all the purchase money was paid; intestate was to enter upon the residue, with the dwelling about 25th December, 1836, or the 1st January, 1837. Previous to the last mentioned period, intestate died, and his widow, who was administratrix of his estate, took possession of the dwelling house and lands, according to the contract, and retained it until the rescission of the contract as hereafter shown.

Defendant admits that Seaborn J. Westmoreland, and Elizabeth, the wife of the intestate, administered on his estate, as alledged in the bill, and that, at different times, they paid the amount due on the first note. After the maturity of the second, he caused an action to be brought thereon, to the circuit court of Macon, against intestate's administrators, and at their importunity, in the fall of 1838, the parties mutually agreed to rescind the contract for the sale of the land. Thereupon he dismissed his suit, and delivered to them the note last payable, and the administrator and administratrix

delivered to him the possession of the land they had occupied, and also his bond for titles; which bond was then destroyed by the defendant.

Defendant further answers, that with the exception of the one hundred dollars paid in advance, and the amount of the note for \$2,900, he received nothing more upon the account of the sale; that after the rescission of the contract, and after one or both the last mentioned notes were delivered to the administrators, he receipted both these notes at the solicitation of Patrick Cousins, who had intermarried with the intestate's widow—Cousins saying that he desired those receipts to enable him to settle with the orphans' court, and the judge of that court wished him to obtain them. These receipts were given in the fall of 1841, or spring of 1842, without any consideration whatever.

He states the quantity of land cleared, while the administrators were in possession, was fifty acres, which was fenced by him; since the rescission of the contract, he has cleared 150 acres, and made valuable improvements in the way of buildings, &c.; but denies that the annual value of the rents and profits are \$2,000, and insists that whatever they have been, he is entitled to them.

Defendant denies all fraud with which he is charged by the complainants—avers that the administratrix was indebted to him \$200, which he yielded up at the time of the rescission, and insists that if the rescission should be adjudged invalid, the complainants are not entitled to the execution of the contract of sale, until he is paid the value of the improvements he has made upon the land, with the amount of the two notes, and interest thereon, which he delivered up. He avers, that the rescission was without solicitation on his part—that it was for the advantage of intestate's estate, while he was the loser thereby.

The answer insists on the rescission of the contract as a bar to a specific performance, and prays the benefit of a demurrer.

Afterwards, the defendant, by consent, filed an amendment to his answer, in which he states, that since he answered, he has seen the three notes which he received on the contract for the sale of the land; that they all bear date on

the 29th September, 1836, and are payable on the 1st day of January, in the years 1837, '38, and '39. In addition to the payments admitted by him, there is a credit of \$141, which is correct.

Several depositions were taken at the instance of the defendant, and one by the complainant, the purport of which are noticed in the decree of the chancellor, and in the opinion of this court.

In the decree it is recited that several exceptions were taken to the testimony, all which the chancellor was inclined to think should be overruled, but he made no decision of the questions, as he was of opinion the unexceptionable parts of the testimony established the same facts as were proved by all the proof in the cause. Thereupon he concluded that the answer was substantially supported as to every essential allegation, and that the defence set up was an available bar to the relief sought by the bill ; that it was immaterial whether the rescission or compromise made with the administrators of the intestate's estate was valid or not ; for if it was invalid, the complainants have no right to ask an execution of the contract, until the purchase money has been paid.

Further, it does not appear that an improper or fraudulent use was made of the notes with the receipts indorsed thereon, in the settlement with the orphans' court, and if this had been the case, the consequence could not have been visited upon the defendant, who had no agency in that transaction. As for the purchase money that had been paid, the bill had not been framed with a view to its recovery, and if such had been its object, the suit should have been brought by the administrators, and not the heirs. The bill was therefore dismissed at the complainant's costs.

W. W. McLESTER, with whom was A. F. HOPKINS, for the plaintiff in error, made the following points : 1. The equitable title descended to the heirs of the intestate, and the administrators were liable to pay the purchase money if assets came to their hands ; unless the heirs were competent to release, and actually did release them. [Newl. on Con. 42 ; 3 Hayw. R. 181 ; 3 Johns. Ch. R. 316 ; 6 Id. 402 ; 1 Stew.

& P. 216 ; 4 Porter's Rep. 385 ; 4 Ala. Rep. 682 ; 5 Id. 503.]

2. The defendant, with a knowledge of the consequences of his act, enabled the administrators to defraud the estate, by acknowledging the receipt of the money on the two notes last payable—and that the administrators had been allowed it. This must operate as an estoppel. [1 Root Rep. 206 ; 2 Id. 207 ; 2 Day's Rep. 272 ; 9 Conn. Rep. 401 ; 5 Ark. R. 566 ; 1 Camp. Rep. 392 ; 1 Esp. Rep. 173 ; 2 Term R. 366 ; 3 Johns. Rep. 68 ; 2 Porter's Rep. 526 ; 5 Id. 498 ; 7 Ala. Rep. 683 ; 14 Pick. Rep. 98.] But if it is allowable to explain or contradict the receipt, it is incumbent upon the defendant to show its correctness. [5 Ala. R. 324.]

3. Where there is no mistake or surprise on the one part, or fraud or imposition on the other, a receipt will conclude the party giving it. [2 Porter's Rep. 526 ; 5 Id. 498 ; 4 Conn. Rep. 308 ; 9 Id. 401.] The proof does not show any accident, mistake, or fraud, rendering a specific performance inequitable, and the intestate's estate is able to repair any loss the defendant may sustain in connection with the transactions in question. [Jeremy's Eq. 424.]

4. The administrators were trustees for the heirs, and if by an arrangement with the defendant, they have succeeded in taking up the notes given for the purchase money with the proper evidence of payment to be allowed as a voucher on the settlement of the administration, the land is discharged of the equitable lien, and the defendant, if he has any claim, must look alone to the administrators. [14 Pick. R. 98.]

5. The acceptance by the defendant of \$3,141, upon account of the sale, and releasing to the administratrix a debt of \$200, and then taking possession of the land, was a fraud upon the intestate's estate, and he cannot insist upon the falsity of his receipts. [2 Ala. Rep. 571 ; Story on Bills, § 267 ; 1 Doug. Rep. 248.]

6. Under the prayer for general relief, the parties should have been placed in *statu quo*. This was the right of the parties upon a rescission of the contract. [1 Story's Equity 254 ; 7 Ala. Rep. 173.] But in no event should the complainants have been taxed with the costs ; for they

were deluded by the evidence of payment which the defendant furnished. [Freeman's Ch. R. 79.]

7. If the receipts could be contradicted, then the rents and profits should have been ascertained and set off against the purchase money, *pro tanto*, and the complainants, upon the payment of the balance, should have had their title perfected. [1 Metc. Rep. 117; 7 Ala. Rep. 742; 7 Paige's Rep. 382.]

8. Although the possession of the administratrix, her improvements and claim to dower, may, as between her and the defendant, sustain the contract for rescission, yet it cannot prejudice the heirs—their equity cannot be defeated. If a specific performance could not be decreed, then the value of the estate of the complainants should be ascertained, upon an issue of *quantum damnificatus*, and a decree rendered against the defendant for the amount. [3 Mass. Rep. 562; 8 Pick. Rep. 329.]

9. The administrators could not pass the title to the land, divested of the equity of the complainants, by rescinding the contract of the intestate to purchase it, any more than he could sell it to a third person without an order of court; consequently the complainants are entitled to a specific performance, without regard to the payment in fact of the purchase money. If it has not been paid, defendant we have said, must look to the administrator for payment.

J. E. BELSER, for the defendant in error. The declarations of the intestate in respect to the contract between defendant and himself, are admissible against the latter, and where evidence of a contract which was in writing is lost, its contents may be proved by parol. [7 Wend. Rep. 136.] So it is allowable to show the declarations of the administrator while they were in possession of the land, or when the rescission took place. [1 Stew. & P. Rep. 220; 1 Ala. Rep. 344; 4 Id 40.] Even the declarations of the administrators at a subsequent time are admissible. [1 Greenl. Ev. § 189.] The administratrix is not interested in the event of this suit, and her testimony is therefore competent. [Id. § 191.]

It is discretionary with the court whether a witness shall

be asked a leading question. [1 Greenl. Ev. § 434; 7 Ala. Rep. 371.]

A receipt acknowledging the payment is open to explanation by parol evidence, showing that the money, either by mistake, misrepresentation, or from some other cause was not in fact paid. [5 Ala. Rep. 224; 2 Johns. Rep. 378; 5 Id. 68; 9 Id. 310; 9 Pick. Rep. 338; 7 Cow. Rep. 334.] And it is no objection to the admission of such proof that the answer does not charge fraud expressly—fraud may be inferred from other matters alledged. [2 Ala. Rep. 572; 3 Id. 375.] See further as to the effect of receipts as evidence, 5 Ala. Rep. 307; 7 Id. 687.]

The bill is not framed with a view to recover of the defendant the amount of the purchase money which he received, and the terms of the rescission provided for its retention by him. If the administrators had no authority to rescind, they are personally liable to the heirs, and not to the defendant. [1 Dess. Rep. 304, 559.]

A bill for a specific performance is addressed to the discretion of the court, upon a full and entire view of all the circumstances connected with the agreement. [2 Ala. R. 83; 6 Johns. Rep. 111.] And chancery will not decree a specific execution where it would operate unjustly, or be greatly prejudicial to the defendant. [1 Ala. Rep. 458; 5 Id. 604; 6 Id. 562.]

Upon a sale of lands for a consideration to be paid in future, the vendor retains a lien for the purchase money. [5 Porter's Rep. 452; 5 Ala. Rep. 397.] And where the payment of the purchase money is made a condition precedent to the execution of the title papers, if the purchaser fails to execute his part of the contract, at the appointed time, without excuse, a specific performance will not be enforced. [4 John. Ch. Rep. 559; 4 Porter's Rep. 374.]

As between the representatives of the real and personal estate, land under mortgage is the primary fund to discharge the incumbrance. [2 Bro. Ch. Rep. 101; 3 Murp. Rep. 194; 3 Johns. Ch. Rep. 252.] The bonds of an intestate vest absolutely in the administrator. [9 Mass. R. 352.] Here they held defendant's bond for titles, and the greater part of the purchase money was unpaid—it was assets. and they were

authorised to dispose of it. [1 Atk. Rep. 462; 3 Id. 235; 7 Johns. Ch. Rep. 21, 150; 5 Am. Com. L. Cas. 271.] The defendant's interest being an equitable lien, he was authorised to enter. [16 Mass. Rep. 285.] And the estate acquired by the intestate's purchase being less than a freehold, could be sold by his administrator without a license from the orphans' court. [9 Mass. Rep. 308; 1 J. J. Marsh. Rep. 168; 5 Stew. & P. Rep. 150.] In making arrangements for the benefit of an estate under their control, administrators are only required to act as prudent men. [2 Hill's Ch. Rep. 364; 2 Dev. & Bat. Eq. Rep. 442; see also, 4 Porter's Rep. 27; 5 Ala. Rep. 363; 7 Id. 920.]

If there was collusion between the administrators and defendant in the rescission, as charged in the bill, the former should have been made defendants to the bill. [1 Johns. Ch. R. 305; 7 Ala. R. 362.]

Until the estate of an intestate is finally settled, the administrators may retain the real estate as assets. [Clay's Dig. 199, § 36; 1 Ala. Rep. N. S. 226.] The bill should have averred the final settlement of the estate.

COLLIER, C. J.—The testimony in the cause very satisfactorily proves that the defendant received no more of the purchase money, than he admits in his original and amended answer was paid to him; that the receipts written on the notes, and which acknowledge their payment, was made at the solicitation of Cousins who had intermarried with the widow and administratrix of the intestate; that no money was paid to the defendant, but the receipts were given, because Cousins urged it—stating that the judge of the orphans' court desired it, and it would enable him to settle the administration account. Upon this branch of the case, it is urged for the plaintiffs in error, that the defendant's receipts are conclusive evidence of the payment of the notes by the representatives of the vendee, and that testimony under the circumstances, is inadmissible to prove the reverse; and to this point we will now address ourselves.

In Cook and Lamkin v. Bloodgood, use, &c. 7 Ala. Rep. 683, we determined, that, where one member of a partnership formed for the practice of the law, acknowledges the receipt

of money for a client, the latter need not inquire how the claim was collected, or whether paid at all, or not, but may charge the firm upon the assumption that the receipt expresses the truth; and the partner who had no agency in giving the receipt cannot gainsay its truth. Such an admission is not a technical estoppel, yet it operates as an estoppel *in pais*. Thus, where the admissions or conduct of a party are such as induce others to act upon them, and a permission to prove their falsity would operate an injury to the persons who were misled by them, they are conclusive of the facts they import. [Welland Canal Co. v. Hathaway, 8 Wend. R. 483.] In Tufts v. Hays, 5 N. Hamp. Rep. 453, it was said that a party shall be estopped by the admission of a fact, where his intent was to influence another, or derive a credit or advantage to himself. But where he has not acted with this view, and there is no breach of faith in receding, he shall not be concluded. And if no injury arises from the representation, it may be laid down generally that it will not operate as an estoppel. As where the defendant told the officer that the goods levied on by an attachment belonged to a third person; on the trial of the suit by attachment, he succeeded, and then the officer sold the goods as the property of such person: *Held*, that the defendant was not concluded, and might maintain an action for the tortious sale. [Wallis v. Truesdell, 6 Pick. Rep. 455. See also Ufford v. Lucas, 2 Hawks' Rep. 214; Robinson v. Nahon, 1 Camp. Rep. 245; Divall v. Ledbetter, 4 Pick. Rep. 220; Swartz v. Moore, 5 Serg. & R. Rep. 257; Gosling v. Birnie, 7 Bing. Rep. 339; Hawes v. Watson, 2 Barnw. & C. Rep. 540; Stephens v. Baird, 9 Cowen's Rep. 274; Chapman v. Searle, 3 Pick. Rep. 38.]

A receipt is but the admission of the party giving it that money or something else has been received by him, yet as a general rule it is inconclusive. It is not only impeachable for fraud, but it is competent to show a mistake or any erroneous or false statement in it, though designed by the parties—in a word, they may always be contradicted, varied, or explained by oral testimony, as will abundantly appear by the decisions of this and other courts. [See 2 Phil. Ev. 213 to 216; 3 Id. 1438-9, C. & H's Notes.] There is nothing in

the receipts of the defendant, or in the proof in the cause, to exempt them from the influence of this principle. It is certain that the administrators of the deceased vendee were not deceived; and so far from there being any thing in the record to show that upon the settlement with the orphans' court, the estate they represented was charged with the amount of the notes, as so much cash paid by them, such is not even pretended to be the fact, and the reverse is clearly inferrable. The defendant did not intend to injure any one by writing his receipts upon the notes, and it not appearing that any one has been injured by them, or that they have influenced the acts of any one prejudicial to the plaintiffs, they are not so conclusive as to require the rejection of extrinsic evidence. The authorities cited upon this point are direct and ample.

Having attained this conclusion, there can be no doubt that the complainants are not entitled in the present condition of the cause to the relief they seek. The bill is at fault in not alledging the payment of the purchase money or any offer to pay it; and if the bill were unobjectionable, the proof is defective in not showing a payment, or a tender.

Even conceding, that, after the settlement of the administration, and a discharge of the administrators from the trust, it is competent for the heirs and distributees to maintain a suit in equity for the recovery of money which was paid by their intestate upon a contract which has been rescinded since his death, and then it may be asked, whether the bill is so framed as to authorize such a decree. It is not alledged that a contract for the sale of the land by the defendant to the intestate had been put an end to, but it is explicitly affirmed that the purchase money had been paid by one or both the administrators; that S. J. Westmoreland, one of the administrators, complainants are informed and believe, fraudulently placed the bond for titles in the defendant's possession, who now retains or has destroyed the same, that he may defeat the complainants' claim, and enjoy the lands. Thereupon, the complainants pray that the title be vested in them, &c.

The *premises* or *stating part* of the bill contains a narrative of the facts and circumstances of the plaintiff's case, and of the wrong or grievance of which he complains, and

constitutes in truth the real substance of the bill upon which the court is called to act. Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises, otherwise he will not be permitted to offer or require evidence of such fact. A general charge or statement of the matter of fact, is however sufficient; and it is not necessary to charge minutely all the circumstances which tend to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs. [Story's Eq. Pl. 23, 24.]

It is an unquestioned rule, that, if the complainant mistakes the relief to which he is entitled, in his special prayer, the court may afford the redress to which he is entitled, under the prayer of general relief; provided the relief, is such as is agreeable to the case made by the bill. Thus we see, although a prayer of general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the court will grant such relief only, as the case stated will justify; and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another; especially, if the defendant may be surprised or prejudiced thereby. If the complainant doubts his title to the relief he wishes to pray, the bill should be framed with a double aspect, so that if the court should decide against him in one view of the case, it may yet afford him assistance in another. [Story's Eq. Plead. 40, to 43. See also *Driver v. Fortner*, 5 Port. Rep. 26.]

We have stated the law applicable to the frame of the bill, from which it appears, that the relief which the court grants must be adapted to, and warranted by the *premises*. Although it may be competent thus far to afford redress even under a prayer for general relief, we think it may be questioned whether the case stated, would authorize a decree under any state of proof for the amount paid by the intestate and his administrators upon the purchase of the land in controversy. But we will not determine this question, nor consider, whether, if the contract is at an end, the administrators should not have proceeded at law. The proof abundantly shows that the defendant and the administrator of the intestate agreed to rescind the contract of sale upon the latter

yielding up the entire amount that had been paid upon the purchase. By this agreement the defendant is still willing to abide, or if the authority of the administrator shall be adjudged incompetent to assent to a rescission, or if the complainants elect, he is willing to consider the contract in force, and offers to execute it, upon the residue of the purchase money being paid. If the administrator had not the power to annul the contract, and the defendant is in no default, the complainants cannot recover back what has been paid, if the defendant is willing to execute it. This is a conclusion so just, that argument is not necessary to support it—in fact, it is difficult to make it more plain than by its announcement.

This view is decisive of the cause, and relieves us from the necessity of inquiring into the extent of the powers of administrators in respect to contracts by their intestates for the purchase of real estate. We have but to add, that the decree of the court of chancery is affirmed.

McCLURE v. LITCHFIELD.

1. Where a note is given on a consideration moving entirely from a third person to one assuming to act for him, any defence of the maker against the party in interest, is admissible where no interest in the note is disclosed by the person to whom it is made.
2. When a note is given to one assuming to act for another, for a debt already owing, and the agreement is that it shall remain with a third person until the concurrence of the creditor is obtained, an attachment afterwards levied, upon such concurrence, will authorize the maker to resist the payment, on showing satisfaction of the judgment on the garnishee process.

Writ of Error to the Circuit Court of Sumter.

ASSUMPSIT, by McClure against Litchfield, on promissory notes.

At the trial, the defendant offered evidence conducing to show the promissory notes were given by him to the plaintiff, for the rent of land, which was rented by one Briggs to the defendant—that after renting the land, Briggs left the country, and the notes were executed for some land and some cattle, which Briggs left there—the notes were taken for the benefit of the wife of Briggs, and were to be placed in the hands of one Curry, until it could be ascertained whether they belonged to the plaintiff or to Briggs.

The defendant then proposed to show an attachment at the suit of Houston & Co. against Briggs, as well as the answer of himself as garnishee, in which he admitted an indebtedness to Briggs for the amount of the notes. Also, the proceedings showing a judgment against him for the amount of the notes, and its subsequent payment by him. The plaintiff was in no ways a party to, or mentioned in the attachment, garnishment, or answer; the last of which admitted the indebtedness to Briggs, without any notice of the plaintiff. The plaintiff objected to this evidence, for the reason that he was no party to the proceedings in attachment. The court, however, admitted the evidence, and the plaintiff excepted.

This is now assigned as error.

R. H. SMITH, for the plaintiff in error, cited *Lamkin v. Phillips*, 9 Porter, 98; *Foster v. White*, *Ib.* 221; *Stubblefield v. Haggerthy*, 1 Ala. Rep. 38; *Foster v. Walker*, 2 *Ib.* 177; 5 S. & P. 200; 3 Porter, 175.

M. F. HOLT, for the defendant in error, insisted—

1. That the plaintiff, in taking the notes, was to be considered as the agent of Briggs, and therefore in equity and justice they should be held as his property. [*Scott v. Surdman*, Willis, 400; *Thompson v. Perkins*, 3 Mason, 232; *Ex parte Dumas*, 1 Atk. 233; *Ex parte Emory*, 2 Vesey, sen. 674; *Chesterfield Man. Co. v. Deshon*, 5 Pick. 7; *Kelly v. Bowman*, 12 *Ib.* 383.] It is true McClure could maintain an

action in his own name ; (Bird v. Daniel, 9 Ala. Rep. 481 ; Story on Agency, § 394 ;) but as no actual interest is shown, or asserted by McClure, he will be considered as suing for the benefit of Briggs, and the defendant is entitled to make the same defence as if sued by Briggs. [Story on Agency, § 404.5-6 ; Atkins v. Auld, 2 Esp. 393 ; Bowen v. Snell, 9 Ala. Rep. 481 ; Coffin v. Craig, 7 Taunt. 243 ; Coffin v. Walker, Ib. 237 ; 1 Term, 621 ; Merrill v. Bank of Norfolk, 19 Pick. 32 ; Kelly v. Manson, 7 Mass. 319 ; Barker v. Prentiss, 6 Ib. 430.]

2. The notes did not extinguish the debt due to Briggs, unless his consent to their being made to McClure was shown, and therefore the defendant properly answered his indebtedness, and the proceedings were proper to show the want, or failure of the consideration. [15 John. 247 ; 8 Pick. 522 ; see also, Story on Agency, § 264 ; 7 Ves. 608.]

GOLDTHWAITE, J.—1. In the condition of this case upon the record, it seems quite clear to us, the evidence of the attachment of the debt due from the defendant to Briggs, was proper, and that for two reasons. In the first place, if the plaintiff has any beneficial interest in these notes, that is not made to appear, and the reasonable inference arising from the circumstance that all the consideration passed from Briggs is, that the plaintiff was merely his agent in the whole transaction. In this view of the case we consider the rule to be well settled, that when the suit is in the name of one person, it may be shown that the entire interest is in another, so as to let in a defence against the one having the real interest. [Story on Ag. § 404-5-7, and cases there cited ; see also Bowen v. Snell, 9 Ala. Rep. 481.]

2. The other reason on which the evidence was admissible is, that it went to the consideration of the notes. These it seems were taken by the plaintiff for a debt due to Briggs, and without authority from him. For the protection of the defendant, they were to remain with Curry until the arrangement received the concurrence of Briggs. Until that concurrence was given, it is clear the defendant was not dis-

charged from accounting to him for the rents, &c. If the attachment then, was levied before this concurrence was signified, can any one doubt the attaching creditor would be entitled to condemn the money due from the defendant? We think the right so to attach the debt is manifest, and if exerted here, there was a failure of consideration. In either of these views, the cases cited by the plaintiff have no influence on the case before us.

In our judgment there is no error in the admission of the evidence. Judgment affirmed.

MASSEY V. STEELE'S ADM'R.

1. The receiving a plea in abatement, after the time for filing such a plea has passed, is matter of discretion in the court below, and cannot be reviewed in this court.
2. It is no answer to a plea in abatement, alledging that the defendant was dead at the commencement of the suit, that in the progress of the suit he appeared by attorney, as a dead man cannot appear by attorney.
3. The defendant is entitled to costs upon a judgment abating the suit.

Error to the Circuit Court of Jefferson.

Suit commenced by attachment, against the intestate of the defendant in error. The attachment was returned executed, and at the return term of the writ, a declaration was filed.

At this term, John D. Phelan, an attorney of the court, and as a friend of the court, suggested to the court, that the defendant in the attachment was dead when the attachment issued, and prayed judgment of the attachment, and that the same be quashed. Subsequently, at the same term, the following entry was made:

"Came the parties by their attorneys, and the motion to quash the attachment coming on to be heard, it is considered by the court that said motion be overruled, and touching the suggestion of the death of Jonathan Steele, the court refused to compel the plaintiff to join issue upon the same."

At the succeeding term, the plaintiff suggested the death of Steele, and a *scire facias* was ordered to issue to his representatives. The writ issued, and was returned executed previous to the fall term, 1841. At the spring term, 1842, the administrator filed his plea in abatement, setting out that the intestate was dead, when the writ of attachment issued.

The plaintiff objected to the reception of this plea, because it was not filed in proper time, but it appearing to the court, that at the October term, 1841, which was the first term after the administrator was made a party, no court was held, on account of the absence of the judge, and that the plea was filed at the next court held for the county, the court overruled the objection to the plea, and permitted it to be filed.

The plaintiff then replied, setting out the facts shown upon the minutes of the court, of the appearance by attorney of the parties, and the refusal of the court to quash, &c. &c.

To this the defendant demurred, and the court sustained the demurrer, and thereupon the plaintiff took issue upon the plea in abatement, which was found for the defendant, and judgment rendered against the plaintiff for costs.

He now assigns for error—

1. The court erred in receiving the plea in abatement.
2. In sustaining the demurrer to the plaintiff's replication.
3. In rendering judgment against the plaintiff for costs.

E. W. PECK, for plaintiff in error:

1. The plea in abatement should have been rejected, because it was not plead in time. [See the 12th Rule of the Practice of the Circuit and County Courts.]

2. The demurrer to the replication of the plea in abatement should have been overruled—1. Because the defendant was estopped by the record from alledging the death of his intestate in abatement of the attachment—2. Because the matter of the plea cannot be made available to abate the attach-

ment; for this reason the demurrer to the replication should have been visited upon the plea.

3. If the suit was properly abated on the plea because of the death of the debtor before the attachment issued, then no judgment should have been rendered against the plaintiff, but the judgment should have been that the suit abate, &c.

ERNEST, contra.

ORMOND, J.—Our first impression was, that the court below erred in receiving the plea of the defendant, to abate the suit, as it was not filed at the first term of the court after the administrator was made a party, according to the requirement of the 12th rule of practice. Subsequent reflection has satisfied us, that this question is not open for consideration in this court, as we have several times held, and especially in *Cobb v. Force, Miller & Co.* 9 Ala. 499, that the rule is not imperative on the primary court, but that it may for good cause permit a plea in abatement to be filed, although the first term may have passed. That is in effect, that the court may in the exercise of a sound discretion permit the plea to be filed after the time for filing it has passed. Such being the case, it is not revisable in this court.

We think the demurrer was properly sustained to the replication of the plaintiff. Waiving the consideration of the right of the plaintiff to reply as an answer to the fact alledged in the plea, matter of record in the same cause, the fact therein alledged was no answer to the plea. First—Because a dead man could not appear by attorney; and secondly, because the record shows that the attorney did not profess to appear for the defendant, but as *amicus curiæ*. The statement of the fact, that the parties appeared by their attorneys, is controlled by the record showing the character of the appearance, and in addition, states an impossibility, an appearance for a dead man.

The defendant was entitled to his costs. Such would be the rule in England, [*Tidd's Prac.* 589] and our statute is much more comprehensive than the statute of Gloucester, as

it declares that in all cases in civil actions, the party in whose favor judgment shall be given, or in case of non-suit, &c. shall be entitled to full costs.

Let the judgment be affirmed.

COX v. WILLIAMSON.

1. Where a note is payable to an individual *eo nomine*, as the guardian of an infant, she may maintain an action thereon in her own name, or after her marriage in the name of herself and husband; but if suit is brought in the name of the ward, by the guardian and her husband, it is not allowable to declare in the name of the guardian, or of herself and husband—adding a count for money had and received to their use. If the note was intended to evidence a debt due to the ward, *quare*, could not the ward sue thereon by any guardian recognized by law?
2. *Quere?* Can a guardian appointed in one State, maintain an action in another State, for a cause in which the ward is interested.

Writ of Error to the County Court of Randolph.

THIS was an action at the suit of the ward by her guardians, Ann D. Williamson and Robert M. Williamson. The first count in the declaration is upon a note payable to Ann D. Bryan, guardian of the ward; the second upon a note of the same date, and amount, payable to A. D. W. and R. M. W.; the third a common count for money had and received by the defendant, alledging a liability to the plaintiff. The general breach alledged is, the non-payment of the defendant, and the judgment upon the margin of the entry is entitled Robert M. Williamson against the defendant. It is alledged in the declaration, that A. D. Bryan, and R. M. W. intermarried, after the making of the note, and that letters of guardianship upon the person and estate of the ward, were

duly granted to R. M. W., by the inferior court of Scriven county, Georgia.

S. F. RICE, for the plaintiff in error, cited 5 Porter's Rep. 388; 1 Ala. Rep. 74, 468; 4 Ala. Rep. 571; 6 Ib. 889; Clay's Dig. 227, § 31; 271, § 20.

L. E. PARSONS, for the defendant in error.

COLLIER, C. J.—The note described in the first count of the declaration, being payable to Ann D. Bryan, guardian of the infant ward, entitled her, while she remained sole, to maintain an action thereon in her own name; and after her marriage, a right of action continued in herself and husband. Instead, however, of thus suing, the ward, by her guardians, is described as the plaintiff, both in the writ and commencement of the declaration; but it is fairly inferrible from what follows the statement of the cause of action in the first, as well as in the succeeding counts, the guardians themselves are to be considered to be the plaintiffs. Thus we see there is a departure from the designation of the plaintiff as made both in the writ and declaration which we have repeatedly held, is not permissible.

We are not to be understood as intimating, that because it is competent for the guardians to sue in their own names on the note, that therefore it is not allowable for the ward to maintain an action thereon. If the note was intended to evidence a debt due the ward, we incline to the opinion, it is competent for her to sue thereon by any guardian recognised by the laws of this State; but a declaration in such case should, perhaps, contain allegations appropriately showing, that A. D. Bryan, when the note was made, was the guardian as indicated upon its face, and was intended to be payable to her in that character. The fact that the name of R. M. Williamson is named on the margin of the entry, as the sole plaintiff in the judgment, if the previous part of the record were free from error, might in conformity to several of our decisions, be amended as a clerical misprision. In the condition of this cause, we need not consider whether, or under what circumstances a guardian appointed in another State

may maintain an action here in respect to his ward's interest. [*See however*, Story's Conf. of Laws, 416-7.] For the incongruities noticed, the judgment is reversed, and the cause remanded, if the plaintiff desires it, that the inconsistencies may, if possible, be remedied.

MAHONE v. REEVES.

1. When proof is made of the refusal of a tender, the defendant is not entitled to have his declarations made at the refusal put before the jury as a part of the transaction.
2. When there is evidence from which the jury may infer the party was the victim of a pre-concerted plan, it is no error to instruct the jury they must find for the defendant, if they believe a fraud is committed.
3. When property is obtained without any, or for a grossly inadequate consideration, by a pre-concerted plan to effect the particular design by representing worthless things of value, it is not necessary for the injured party to offer to return the worthless thing, before his right of recaption attaches.

Writ of Error to the Circuit Court of Talladega.

TROVER by Mahone against Reeves, for the conversion of a horse.

At the trial, the following state of facts was proved by the plaintiff, to wit: On the 14th October, 1845, the plaintiff was at the house of one Jackson, in Talladega county, and was there detained several days by indisposition. One Burns, who had a blacksmith's shop near Jackson's residence, had traded the plaintiff a wagon for claims or notes on individuals whose names were not in proof, and whilst they were speaking of that trade, and at this time, when the plaintiff had a bundle of notes in his hands. Afterwards, the defendant came to the house of Jackson on

private business, and hearing Burns and plaintiff speak of the wagon trade, asked the plaintiff if he wanted to trade for a horse. The plaintiff answered, that if the horse was a good one, he would trade with defendant. The parties then went away, and came back the next day with the horse. The parties were in a room together, and a person who went in there asked the defendant if he had sold his horse. The defendant replied he had given him away. The witness then said, "Well, you will at least save your corn by the trade." Defendant replied, "Yes, I'll get rid of feeding him, and I may get only \$50, or I may get the value of him." The plaintiff then said, "I have no doubt you will get the value of the horse; one of the men makes 150 bales of cotton." Defendant replied, "Well, may be I can get negroes for these notes;" and the plaintiff turned to the witness and inquired jocosely, "Don't you want to buy negroes?" The parties then put the horse in the stable, and while they were there, Jackson asked the defendant if he had traded his horse. Defendant replied, "Yes." "What did you get?" "I got \$2300 and his—Mahone's—note for \$50." Jackson said if there were no sets-off, the defendant would surely get the value of his horse out of that amount. Defendant replied, "I may get the value of the horse, and I may get the \$50, and I may get none." The plaintiff then said, "I have no doubt you will get the value of the horse, one of the men makes 150 bales of cotton a year." Jackson did not remember distinctly, but thought that whilst the parties were speaking of the claims, the name of Raiford was used, and perhaps Spann also. After the defendant had gone, the witness asked plaintiff what he gave for those claims, and the plaintiff said he had given \$100 at a bankrupt sale. The plaintiff objected to this evidence of his declarations, but it was allowed against his exception.

The witness did not see or examine any of the claims given by plaintiff in payment for the horse, except the \$50 note, which was identified. The plaintiff left Jackson's house the next day, taking the horse with him, and was not seen by him afterwards. The plaintiff left with Jackson the waggon obtained from Burns, and the defendant left with him also the \$50 note, which the plaintiff promised to send up money to

pay, when he should send for the waggon. Two days after the defendant came and demanded the \$50 note, and said he was swindled. The plaintiff objected to evidence of what the defendant said, and the court sustained the objection. The horse was proved to be of seven or eight hundred dollars value, and was afterwards taken from the possession of an agent of plaintiff, in Macon county, by a stratagem.

The plaintiff proved a tender at the term of the court before the trial, of the sum due on the \$50 note, and the defendant then offered to return a bundle of papers to the attorney making the tender, and which he said were the papers he received from plaintiff. On cross-examination, this witness was required by the defendant to state the remainder of the conversation had at the time of the tender of this money; the plaintiff objected, but the court allowed it. The witness then stated, that the defendant, in the same conversation, said the plaintiff had cheated and swindled him in the trade, and then handed the witness, who was the plaintiff's attorney for suing, a bundle of claims, or notes, which the witness refused to take, and did not examine, but to the best recollection of the witness, the defendant, in speaking of these claims, mentioned the names of Raiford and Spann, and asserted the claims to be worthless.

The defendant introduced a witness, who testified, that about the 22d September, 1845, he went with the defendant to Macon county, in search of the horse; they saw the plaintiff, but did not speak to him; they then went to another part of the county, where the horse was in charge of an agent of plaintiff. To this agent they spoke of a trade for the horse, and the defendant having mounted him under pretence of ascertaining his gaits, he turned to the agent, and said "this is my horse," and presenting a bundle of papers added, "these are the papers Mahone gave me—he swindled me out of the horse—that is my horse still—I intend to keep him, and you can take Mahone's note, and all the papers, they are worthless any how. The witness could not read writing, but the defendant told the person having charge of the horse, that there was a note on Mahone in the bundle. The agent took the bundle of papers, looked in it, folded it up, but said nothing. Immediately afterwards, at the sug-

gestion of a bystander, that the defendant might be treating him badly in the affair, the agent requested the defendant to take the papers, as he did not wish to be troubled with them. The defendant took the bundle of papers saying, "I have been riding several days in search of the plaintiff and my horse—it is over forty miles out of my way home to go to see the plaintiff; he knows where I live, and I will keep the papers for him; They are worthless any how, and he can get them at any time.

The defendant then read in evidence the statement of a witness, who stated he was the brother of James and Robert Raiford, and also knows Oswell E. Burt. About the first February, 1845, the plaintiff called on witness for information about certain notes or claims, which the plaintiff then had against the persons above named, and others. That the witness then told him, he believed the notes and claims were paid off and settled. Also, that James and Robert Raiford resided in Marshall county, Miss., and likewise gave him information of the residence of the other persons on whom the plaintiff had notes and claims. The plaintiff informed witness that he had bought the claims at a sale made by the assignee in bankruptcy, as the property of one Spann. Witness stated that Robert Raiford has always been solvent, and in possession of considerable property.

The plaintiff objected to this evidence, but it was allowed.

The defendant also proved, by the depositions of James and Malicha Raiford, that certain notes to one Spann, were settled, paid, or otherwise valueless. He also produced in court the \$50 note of the plaintiff, and tendered it to the plaintiff's attorney in open court. He also offered in evidence a bundle of notes or claims, and tendered them to the plaintiff at the trial, but the court would not allow them to be read in evidence to the jury.

This, in substance, was all the evidence before the jury, and on it the plaintiff asked the court to charge the jury—

1. That there was no sufficient evidence of a tender to return the plaintiff's note for \$50, if that was considered of any value.

2. The court charged the jury, that if they found from the evidence, what notes were given for the horse—that these

notes, or some of them, had been paid off before the trade, and that plaintiff had been notified before he made it, that some of the claims or notes then given for the horse had been paid—and also that he failed to disclose this information to the defendant, then the failure to do so was such a fraud as would annul the contract, that being a material fact, which should have been disclosed to the defendant, under the circumstances. And if the contract was void on this ground, the defendant might peacefully retake the horse wherever he found him. And if the papers were valueless, the defendant need not return, or offer to return them before taking the horse.

3. The plaintiff asked the court to charge, that if the defendant failed to prove what claims he received for the horse, and that there was no legal proof of this fact, inasmuch as the claims themselves were the best evidence, he cannot avoid the sale, or defeat a recovery in this action, by proof of payment by Raiford.

4. That the proof in this case does not amount to fraud, so as to vitiate the sale.

5. That the information of the plaintiff, derived from the witness, Raiford, was matter of opinion, which he was not required to communicate at the trading.

6. That the defendant, to get rid of the trade, must prove to the satisfaction of the jury—1. What he got for the horse—*if notes, he must produce the notes, or account for their loss.* 2. He must prove the notes were valueless, or show an offer to return them, either to the plaintiff or to an agent authorised by him to accept them. 3. That the plaintiff, when making the trade, either supposed facts which fair dealing required him to declare, or made false representations to induce the trade, and which did induce it, knowing the same to be falses.

The court refused all the charges except the last, which was given, with the exception of the last clause of the first paragraph above stated in italic.

The plaintiff having excepted to the several charges as given by the court, and to its refusal to charge as requested, now assigns the same as error, as he also does the several rulings in regard to the evidence.

W. P. CHILTON, for the plaintiff in error:

1. There is no proof of fraud in this case, and the charge of the court which supposes it, is erroneous and abstract.

2. The proof evidently declares that Reeves took the notes, without any guaranty of any sort from plaintiff. "He might get the value of his horse, and he might only get the \$50, for which plaintiff gave his note."

3. The declaration of plaintiff, that he believed defendant would get pay for his horse, as one of the men was wealthy, was *after* the trade, and could not have *influenced* it. [Juzan et al. v. Toulmin, 9 Ala. Rep. 662.] The declaration was not trusted. [Van Arsdale & Co. v. Howard, 5 Ala. Rep. 596.] But it was at best but an opinion. [Evans & Arrington v. Keland, 9 Ala. Rep. 42; Williams v. Cannon, Ib. 349.]

4. The court should have charged, that plaintiff was not bound to communicate what William Raiford told him *he believed* about the claims. Such belief was not a fact, but an opinion, which is *prima facie* rebutted by the notes being outstanding.

S. F. Rice, contra:

1. Although the evidence may not seem to warrant the verdict, yet an appellate court will not reverse, where no question as to its effect was made to the jury. [Rhodes v. Sherrod, 9 Ala. Rep. 63.] Nor will this court revise a charge asked as to its effect, if there is any conflict. [Browning & Co. v. Grady, at this term.]

2. Declarations made at the time an act was done, are admissible as part of the *res gesta*. [Yarborough v. Moss, 9 Ala. R. 382; Pitts v. Burroughs, 6 Ala. R. 733.]

3. A misrepresentation may be as well by deed, or acts, or words, or by *artifices to deceive*, without any positive assertion. [Juzan v. Toulmin, 9 Ala. Rep. 684.]

4. The identity of the consideration given by Mahone to Reeves for the horse, was a question solely for the jury, and was left to them. And as there was evidence admitted without objection, tending to establish that identity, it was proper for the court to refuse to charge, that if the consideration

was notes, the notes must be produced. [P. & M. Bank v. Borland, 5 Ala. R. 531.]

5. A tender to an agent is good. And in a case of fraud, like this, the tender would have been sufficient, if not made until the trial, as the consideration was worthless. Two days after the trade, the \$50 note of Mahone was tendered to his agent, Jackson.

GOLDTHWAITE, J.—1. One of the questions raised by the bill of exceptions, is, of the right of the defendant to put his own declarations before the jury as evidence, because these were made at the time of refusing to receive payment of the note given when the horse was sold. The tender of payment may not have been very material in this cause, but we cannot say it was improper, as otherwise a strong inference might be drawn against him on account of the omission. Evidence being admissible that a tender was made, the fact must stand as it does in other cases, and if the refusal cannot be shown without letting in all that the opposite party may choose to say, it would in most instances be a dangerous ceremony. In general, a tender is a mere formal act, having often no other object than the avoidance of a conclusion, and in this view it seems precisely similar to a formal demand of a chattel for the purpose of showing a conversion. In both cases it is possible there may be such a peculiar condition of circumstances as might authorize the reply of the party to be given in evidence, though in general the refusal is rather an act than a declaration. In the one case, the offer to pay, and in the other the demand of the chattel, is made, and if not accepted or refused, the same legal consequence results, independent of what may be said on the occasion. We do not remember to have met with any decision on the matter of tender, but with regard to the demand of chattels, we have two cases in which the rule is settled substantially as above stated. [Dent v. Chiles, 5 S. & P. 383; St. John v. O'Connell, 7 Porter, 466.] The declarations of the defendant, which were in this case put before the jury as part of the conversation arising at the tender, were well calculated to affect the plaintiff, although it may be the other evidence was sufficient to make out the facts then asserted. How-

ever this may be, the error is clear in permitting the declarations to go to the jury, and because of it the judgment must be reversed.

2. On the other points of the case, we think there is no substantial error. Without saying any thing which may prejudice the cause at another trial, we think it sufficiently clear, from the whole evidence, that a jury might have come to the conclusion that the defendant was the victim of a preconcerted plan. To say more upon this subject, might produce the effect of withdrawing from a jury, what is not merely their province, but their duty to determine, by the exercise of their own judgment, without being in the least degree influenced by the opinions of others.

3. It is proper however to say, that when property is obtained by one individual from another, without any, or for a grossly inadequate compensation, by a preconcerted plan to effect the particular design, by representing a worthless thing as of value, it is not in our judgment necessary for the injured party to offer to return the valueless thing before his right of recaption attaches.

For the error we have ascertained, the judgment is reversed and remanded.

RUSSELL v. LA ROQUE & HATCH.

1. Where one who is the surety of another, receives from him as an indemnity a promissory note payable at a particular time, he may sue upon it, though he has not been compelled to pay the surety debt, if his liability to pay continues. *Quere*—Has not the debtor in such a case an equity to insist, that the money so recovered shall be applied in discharge of the principal debt?
2. Where a surety about to be sued, and before the statute of limitations has

Russell v. La Roque & Hatch.

created a bar, hands to the creditor for suit, a note which had been executed to him by the principal debtor as an indemnity, the effect is such an admission of indebtedness on his part, as will postpone the operation of the statute six years longer as to him.

Error to the Circuit Court of Sumter.

ASSUMPSIT by plaintiff on promissory note for \$700, due 1st March, 1839.

Upon the trial, as appears from a bill of exceptions, the defendants introduced an affidavit and interrogatories, propounded to the plaintiff, with his answers thereto. The affidavit stated in substance, that the note sued on was given to plaintiff to indemnify him as security for one William L. La Roque, on a note for \$1919 37, to the Tombigbee Railroad Company, dated February 8th, 1838, and due at four months. That from the lapse of time said Russell was discharged from liability for any part of the note to said company, that he has never paid any thing thereon, and is not liable to do so. The material interrogatories are—

1. What was the consideration?
2. Have you ever paid any thing on said note, or are you liable to do so?
3. Has not more than six years elapsed since the note fell due, so that a recovery is barred by the statute of limitations?
4. Was not a quantity of cotton delivered to said company, sufficient to discharge said note?

To the first he answered, "I as agent of the Mass. and Ala. Land Company, and a party interested therein, sold a certain tract of land to one Eastman on credit, titles to be made when paid for. Eastman sold to La Roque, and made deed therefor to him, who made a deed of trust on the same land, and on his negroes, to secure the notes which he gave in the place of Eastman, for the purchase money of the land, and also to secure and indemnify myself, and Rufus G. Lewis, for going security, which we then did for La Roque, on a promissory note for about \$2000, to the Tombigbee Railroad Company. Afterwards, La Roque being about to sell the land to Hatch, to relieve the land from the incumbrance created by the deed of trust, proposed to

turn over the notes, or to procure the notes of Hatch to be made to me, for the amount of the purchase money. This, deponent declined to accede to, for the reason that the purchase money was not all that was secured by the deed of trust, but that myself and Lewis were also thereby secured for our suretyship for La Roque. La Roque and Hatch represented, that the former had delivered about forty bales of cotton, to be sold for account of the note to the railroad company, and that there could not be a deficiency on said note of more than \$700; and to induce me to go into the arrangement, and raise the incumbrance aforesaid, offered to execute the note here in suit, to stand for and against such delinquency as might exist between the nett proceeds of the cotton and the amount of the note to said company, and did execute and deliver the same therefor to protect said Lewis and myself. To the second I have never paid any thing, unless the following may be considered in that light. About the date of the commencement of this suit, Jonathan Bliss called on me, with said note to said company, showing a balance, I think, of something more than the amount of the note sued on, and said he must either sue me on the note to said company, or must make the money from the note here sued on, and I turned over this note to be sued, and that the money might be made thereon, so far as it would go, for the deficiency due on the note to the company. I did not, and do not consider myself liable on the note due the company. To the third—more than six years have elapsed since said note to said company fell due, so that said note would be barred as to me by the lapse of time, if I should see fit to invoke it."

The court in charging instructed the jury, that if one man indemnified another against loss, the person indemnified has no right of action until he has experienced the loss against which he is indemnified. That if the plaintiff could recover before he was compelled to pay, he might perhaps recover for a large amount, and then satisfy or discharge the claim against which he was indemnified, for a comparatively small sum. Also, that if the statute of limitations had begun to run on the note to the railroad company, when the note sued on was turned out, and more than six years had elapsed since the statute commenced running, it would bar the liability of

said Russell on that note, and he could not as security omit to avail himself of the statute, and yet claim indemnity for the loss he might have avoided by pleading it.

The plaintiff requested the court to charge, that if Russell was liable to the railroad company, to the extent of the note sued upon when he turned out this note, and when suit was brought upon it, and being so liable turned out this note, that the money might be made therefrom to satisfy the sum for which he was so liable, the defendants are not discharged from their liability on the note sued on, by the fact, that since the note was in suit, more than six years have elapsed since the note to said company matured. This charge the court refused, and stated, that if the note to said company was past due when this note was turned out and sued on, and the six years had run since, upon the note to the company, then the statute barred a recovery on said note to said company against said Russell, and discharged him of it.

The plaintiff further moved the court to charge, that if the note sued on, though payable to Russell, was made for the joint indemnity of Russell and Lewis, for their liability for said La Roque on the note to said company, the defendants are not discharged from liability on the note sued on, by showing that Russell is no longer liable on the note to said company, unless the same is shown to be the case as to said Lewis. Which charge the court refused to give, but instructed the jury that said Lewis was not a party, and was not to be regarded in the matter.

To the charges given, and to those refused, the plaintiff excepted, and now assigns the same as error.

BLISS & BALDWIN, for plaintiffs in error:

1. The court erred in its first charge, viz., that plaintiff could not recover, until he had paid the note to bank. [Pitman on Prin. and Surety, Law Lib. 40, p. 93, marg. 126-7-8; Theobald on do. Law Lib. 1, p. 136, marg. 230, § 249 and 231, § 250; Morell v. Smith, et al. 5 Cow. R. 441; former decision in this case, 7 Ala. R. 798.]

2. The court erred in its charge as to the statute of limitations, and its effect on plaintiff's right to recover—1. Mere lapse of time does not discharge plaintiff from the note to

the bank; and plaintiff is not bound to shield himself under the statute. [1 Mass. R. 139.] 2. Plaintiff was entitled to recover when he commenced his suit, and the right is to be determined in reference to that time. No after act between other parties could defeat plaintiff's right to recover; at least for costs and actual damage. 3. Rightly considered, the statute has no application to the case. Plaintiff either paid out the note sued, or pledged it; and in either case, the statute would not further run.

3. If the principal debt was barred as to the surety, it does not affect the right to recover on the note sued. [8 Met. 19; 2 Ala. R. 331; 4 Ib. 223.]

4. The last charge, viz., that in reference to Lewis and his interest and discharge, is so obviously incorrect, that it cannot be made more apparent than by the record.

REAVIS, contra.

1. The note sued on was given to indemnify the plaintiff and one Lewis, against loss, by reason of their being security for La Roque: they have never been subjected to any liability or injury. The first charge of the court is applicable to these facts, and is the law arising upon them. [La Roque & Hatch v. Russell, 7 Ala. Rep. 798.]

2. Russell holding a contract of indemnity from his principal, would be bound to plead the statute of limitations, if it was a bar to his recovery against his principal or himself. [Castleton v. Miner, 8 Vermont Rep. 212, cited in 2 U. S. Dig. 517, § 14; Randolph v. Randolph, 3 Rand. 490.] When the statute begins to run it continues, unless stopped in its progress by the act of the party seeking its benefit. [Johnson v. Wren, 3 Stew. 172; Grice v. Jones, 1 Stewart, 254.] The transfer of the note sued on, under the circumstances stated, did not arrest the progress of the statute: there was no promise to pay, and so far from suit being delayed at his instance, the transaction between him and Bliss was at the request of Bliss, and by that arrangement Russell considered himself released from liability on the note to the railroad company, and there is no evidence to show he is mistaken. When this case was before this court at a former term, (La Roque v. Hatch & Russell, 7 Ala. Rep. 798) the court said

if it had been shown in addition to the evidence offered, that the liability of Russell was at an end, the defence would have been complete. That fact is now shown by the sworn admission of Russell himself; and the case is brought under the influence of that decision: the second charge was therefore correct.

3. If the second charge given was correct, the court properly refused to give the first charge requested.

4. The evidence which shows Russell is not liable, shows also that Lewis is not. The evidence shows that the statute of limitations has perfected a bar in favor of all the parties to the Tombigbee note, and there is no evidence to take the note out of the statute as against any of them: besides, if the arrangement between Bliss and Russell exonerated Russell as Russell says it did, it released Lewis the other surety also. Russell's understanding of the arrangement between him and Bliss, to say the least, was entitled to the consideration of the jury: the charge asked was therefore properly refused. If the charge given in lieu of the second charge asked should be considered erroneous, it is likewise immaterial, and could not have misled the jury, for the evidence shows Lewis was no longer liable on the note to the railroad company. From the transaction between Bliss and Russell it is to be inferred, (there being no evidence to the contrary) that Mr. Bliss was the owner of the Tombigbee note, and if he took the note sued on and discharged Russell, he discharged Lewis the other surety also. [Towns v. Riddle, 2 Ala. Rep. 694; Letcher v. Yantis, 3 Dana, 160; 2 Kinne's Law Comp. 708, and cases.] But Russell could not put any one else in a better situation than he was, by giving up the note sued on: for if he could recover on it without having paid the debt for which it was indemnity, he would only hold the fund as trustee until his liability was fixed as surety. [Fletcher v. Edson, 8 Vermont Rep. 299.]

5. Russell in his sworn answer admits that he has never paid any thing on the note to the Tombigbee Railroad Company: he says it is barred by the statute of limitations, and that he is no longer liable on it since he gave the note sued to Mr. Bliss. These are uncontroverted facts, as shown by the record. Why then should he recover? If he cannot or

could not recover for himself, why should he for any one else, when he cannot by an assignment of the note, put his assignee in a better predicament than himself. If then it appears from the uncontroverted and sworn admissions of the plaintiff himself, that he is not entitled to recover, if any of the charges given or refused are erroneous, the court will not reverse the judgment for that reason. [Caruthers & Kinkle v. Mardis, 3 Ala. Rep. 599; Brock v. Young, 4 Ala. Rep. 584; Evans v. Gordon, 8 Porter, 142.]

ORMOND, J.—What is the true nature of the indemnity intended to be given to the surety, by the execution of the note in suit? Was it designed as a mere indemnity against loss, in the event he was compelled to pay the debt for his principal, or did the parties intend to provide an indemnity against liability to suit? We held in effect that it was the latter, when this case was here at a previous term, (7 Ala. R. 798) and such is still our opinion.

It is frequently a matter of great doubt and difficulty, what the true nature of an indemnity is, but the circumstance which influenced our judgment previously, and which has confirmed it on subsequent reflection, is the fact, that the note executed as an indemnity, was payable at a day certain, thus establishing very satisfactorily, that the right of the surety to an action on the note, was not to depend on his being compelled to pay the debt for his principal, as the time when that would happen was uncertain, if it happened at all, whilst the right to sue at a particular time was ascertained, and depended on no contingency.

The court of exchequer has recently decided the same point, in a case the facts of which are precisely the same as in this, and held, that the surety could sue on the covenant given as an indemnity, though he had not been compelled to pay the principal debt, as in this case remaining unpaid. Baron Parke adds, "the defendant may perhaps have an equity that the money he may pay to the plaintiff, shall be applied in discharge of his debt, but at law the plaintiff is entitled to be placed in the same situation under this agreement, as if he had paid the money on the bill." [Loosemore v. Radford, 9 Meeson & W. 657.]

Whether the surety could have maintained an action on the note, after the statute of limitations had created a bar to the suit on the debt, for which he was surety, is a question not necessary to be decided. The facts are, that before the principal debt was barred by the statute, the attorney of the creditor called on the surety for payment, and was about to institute a suit against him, when he handed over to the attorney the note thus executed as an indemnity, to be sued on, instead of being sued himself, and whilst this suit has been in progress, the time has run on the principal debt.

It does not appear that the creditor released the liability of the surety, upon receiving the note for suit. It is true, the surety who was examined as a witness, says he does not consider himself liable on the note to the company, but whether he is still liable or not, is matter of law, and does not depend on his opinion. There is no fact stated by him from which such an inference can be drawn. The substance of his testimony is, that he handed this note to the attorney of the creditor for suit, and to prevent a suit from being brought against himself. It does not appear that the original liability was given up to the surety, or canceled, and it appears to us that this note was in effect received by the creditor, as a collateral security from the surety. The transaction between these parties, is an unqualified admission on the part of the surety, that the company's debt was then due, and its effect was to postpone the operation of the statute six years longer. [St. John v. Garrow, 4 Por. 223]; and the same principle has been re-affirmed at the present term in *Deshler v. Cabiness*. In this aspect of the case, as the liability of the surety still continues upon the original debt, he may maintain this action for his indemnity.

If the liability of the surety does not continue, then the delivery of the note by the surety must operate as a payment of the debt, and extinguished the liability both of himself and his principal upon the note due the railroad company, and in that event it is obvious the action is maintainable.

We are not able to ascertain from the record, that there is any difference between the condition of the plaintiff in error and Lewis. If the statute of limitations has not operated in his favor, the fact should be shown. The presumption must

be, in the absence of proof, as more than six years have elapsed since the debt matured, that it is barred.

The intimation thrown out by Parke, Baron, that the debtor would have the right to apply to a court of chancery to direct the amount recovered by the surety to be applied to the payment of the principal debt, has been effected in this case by the surety turning over to the creditor, the note given as an indemnity to be sued for, and applied in payment of the debt, which when received by him, will extinguish the liabilities of all the parties, both principal and sureties. Let the judgment be reversed and the cause remanded.

CLEMENTS v. ELLIOTT.

1. A judgment was recovered, and an execution issued thereon levied on property to which a third person interposed a claim; pending the trial of the right of property, the judgment was reversed, notwithstanding which the trial proceeded, and the property was condemned: *Held*, that the judgment of condemnation beyond the amount of cost in the proceeding in which it was rendered, could not be enforced by execution—that it being consequential and dependent, the reversal of the judgment in the principal case, took from it a necessary and indispensable foundation.

Error to the Circuit Court of Tuscaloosa.

THE facts of this case are these: At the term of the county court of Tuscaloosa, holden in July 1841, the plaintiff in error, by notice and motion, recovered a judgment against the defendant, upon the allegation that he had paid money for him as a surety; an execution was issued upon this judgment, and placed in the hands of the sheriff of Tuscaloosa, which, on the 29th September, 1841, was levied on a negro boy, as the property of the defendant, to whom Moses Hendrix interposed a claim, pursuant to the statute. At the

March term, 1843, a trial of the right of property was had, and the slave condemned to satisfy the execution. Afterwards, at the term of the supreme court, holden in June, 1843, the judgment recovered in the county court, by the plaintiff against the defendant, was reversed.

The petition states, that Hendrix had, "arranged to pay the costs upon the trial of the right of property," yet notwithstanding all these proceedings, an order had been issued upon the judgment on the trial of the right of property, requiring the sale of the slave. This order has been placed in the hands of the sheriff, to whom the defendant has executed a bond for the delivery of the property, to be sold to satisfy the plaintiff's execution against him.

Upon these facts an order was made to supersede the order of sale; and the petition being sustained by proof, the *supersedeas* was made perpetual, and the plaintiff adjudged to pay the costs.

E. W. PECK, for the plaintiff in error, made the following points: 1. The plaintiff insists that the execution superseded was regular, and supported by a subsisting and operative judgment; and was therefore improperly superseded.

2. If the defendant was entitled to relief, it was in chancery, where the rights of the plaintiff would have been protected, by compelling the defendant to do equity, by paying the plaintiff the sum which he had actually paid as the defendant's security.

3. The case made by the evidence recited in the judgment entry, even if the remedy was properly sought in this mode, does not authorize the judgment making the *supersedeas* perpetual.

W. COCHRAN, for the defendant.

COLLIER, C. J.—The trial of the right of property, to which the plaintiff and Hendrix were parties, was consequential to, and dependent upon the judgment recovered against the defendant, in 1841. The object of the plaintiff in the

prosecution of the suit against the property, was to obtain satisfaction of his judgment, and if that judgment had lost its vitality by reversal on error, pending the claim of Hendrix, even if the court had proceeded to the trial, for the purpose of ascertaining who should pay the costs, and the claimant was unsuccessful, no order of sale would have followed. In fact, if the judgment against the defendant had been vacated, there would have been nothing of which the court could have ordered satisfaction, or upon which such an order could have rested.

The defendant was no party to the suit between plaintiff and Hendrix, and *prima facie* had no interest in it; consequently, the decision in that case determined nothing adversely to him, nor imposed upon him any liability beyond what had been already ascertained. It determined nothing more, than that a slave which had been levied on under an execution founded on the judgment against the defendant, was his property, and subject to its satisfaction; and that the slave might be available for that purpose, it was ordered that he be sold. The reversal of the judgment, in point of law annulled it, and left the order nothing upon which to rest—its effect upon the order was quite as potent as the payment of the amount of the judgment and execution.

It follows, that the judgment of the circuit court superseding the order of sale, was in conformity to law; and it is therefore affirmed.

COX v. EASLEY, ET AL.

1. Declarations of a plaintiff in trespass, made in relation to his title after the trespass complained of, are not competent evidence in his own favor.
2. Neither is the act of the sheriff, in omitting to make sale of the property

as that of a third person, evidence, when induced by such declarations of the plaintiff after the trespass.

3. The bailee of a sheriff, to whom the property of a third person is delivered upon a contract to return it at the sale day, has such a property in the thing bailed as will authorize him to sue a wrong doer, for depriving him of the possession.

Writ of Error to the Circuit Court of Talladega.

TRESPASS *de bonis asportatis*, by Cox, against Easley, J. A. and E. A. Givens.

The defendants pleaded not guilty, and by agreement were to be allowed to give any matter in evidence which could be specially pleaded.

At the trial, the plaintiff offered evidence tending to prove, that before the suit was commenced, on the 22d of June, 1845, the property in the declaration mentioned, that is, a buggy and harness, was in his possession in the town of Talladega, and that the defendants then and there, took the same from him. After proving the value of the property, the plaintiff put in evidence the deposition of the sheriff of Benton county, showing that he, in that capacity, had levied on the same property in that county, as belonging to one Herndon, by virtue of sundry writs of *fi. fa.* against him. Some few days after the levy, the plaintiff, Cox, called on him for the buggy and harness, and gave as security for its forthcoming, \$300 in silver. For this money the sheriff gave the plaintiff a receipt, conditioned that he return the property on or before the day of sale, which was to be the first Monday of August, 1845. At the time the plaintiff replevied the property, he claimed to be the owner of one half the buggy and harness. He also claimed them on the day of sale. The sheriff sold the undivided half of the buggy and harness on the first Monday of August, 1845, as the property of Herndon. The plaintiff had the possession of the buggy and harness from a few days after the levy, until the day of sale, or at least he received the property from the sheriff of Benton then, and returned the same to him on the day of sale. The sheriff further stated, in his deposition, that he made the

levies spoken of on the property, as that of Herndon, and sold one half of the buggy and harness as his property, *the other half was claimed by the plaintiff, whose interest the sheriff did not sell, as the plaintiff forbid the sale of his moiety.*

The defendants objected to that portion of the deposition above italicised, and the court excluded it.

The plaintiff then proposed, in connection with the other parts of the deposition, to read the words *the other half was claimed by the plaintiff.* This the court refused to allow, as it also did to let any part or portion of the excluded paragraph be read.

After all the direct and cross interrogatories with their answers had been read, the plaintiff again proposed to read the excluded paragraph, but the court still refused, and the plaintiff excepted.

In this connection it is proper to state, that in answer to a cross-interrogatory, the sheriff answered, that at the sale of the buggy and harness, the plaintiff became the purchaser.

The court charged the jury, that if they believed the testimony of the sheriff of Benton, and they should find that the only possession, and right of possession, the plaintiff had to the property sued for, were acquired by said deposit and bailment mentioned in the sheriff's deposition, then, that possession did not authorize the plaintiff to sue and maintain this action. This charge was given in reference to the testimony of the said sheriff, without considering any defence made in the case, but it was shown the defendants seized the property under an attachment, and this seizure was six days after the levy in Benton county.

The court further charged the jury, that in this action the official act of the sheriff of Benton in not selling the entire property, was no evidence whatever of the plaintiff's right to the property, and that the jury could not draw any inference favorable to the plaintiff's right to the property, or any portion of it, from the acts of the sheriff of Benton county.

The court further charged the jury, that the declarations of the plaintiff, or a claim of property by the plaintiff, as shown in the answer of the sheriff of Benton, to the last interrogatory above set out, were no evidence of the plaintiff's

right to the property. These two last charges were given with reference to the evidence above set out, and also with reference to some other evidence before the jury, which tended to show the plaintiff about the 10th of June, 1845, had possession of the property.

The court also charged, that if the jury believed, that the plaintiff had a possession, or right of possession, to any part or interest in the property, other than that acquired by the arrangement with the sheriff of Benton county, as spoken of by him, they should find for the plaintiff.

The plaintiff excepted to the several charges given, except the one last stated; and they, with the several rulings of the court in relation to the evidence, are now assigned as error.

S. F. RICE, for the plaintiff in error.

1. It is settled beyond all doubt, that where there is a letting for a specified time, (or a bailment on valuable consideration, for a definite period,) to a third person, the possession is in such third person, and *he alone can maintain trespass*. [Putnam v. Wyley, 8 Johns. Rep. 432, and cases there cited in note a.; Sutton v. Buck, 2 Taunt. 302; Ward v. McAuley, 4 Term R. 489; Gordon v. Harper, 7 Ib. 9; Wilson v. Macreth, 3 Burrows, 1824; Seneca R. Co. v. A. R. R. Co. 5 Hill N. Y. Rep. 180.]

2. A mere bailee may maintain trespass for the taking a personal chattel out of his possession, by a stranger, provided the bailee is answerable to another for the chattel. [Hare v. Fuller, 7 Ala. Rep. 717; Traylor v. Marshal, at this term.] Especially if the bailment is allowed by law. [5 Ala. Rep. 45; 8 Id. 467.]

3. Where the sheriff of Benton county levies a *fi. fa.* on personal property, as the property of E. Herndon, and lets it to Cox, on his depositing \$300, in specie, as security for the return of the property to that sheriff on the day of sale; and between this letting and the day of sale, the sheriff of Talladega county levies an attachment against said Herndon, on the same property in possession of Cox—this second levy is void and is a trespass. [Easley v. Walker, 10 Ala. R. 671; Whitsett v. Womack, 8 Id. 466, 479; Vinton v. Bradford, 13

Mass. Rep. 114; Rives & Owen v. Wellborn, 6 Ala. Rep. 45.]

4. The declarations of a party, forming part of the *res gesta*, are admissible evidence in his favor, and their weight must be determined by the jury—not by the court. So the *official* acts of the sheriff of Benton, and Cox's declarations, should have been left to the jury, in connection with the fact in proof, that Cox had possession of the property *before* the levy, in Benton. [Pitts v. Burroughs, 6 Ala. Rep. 733.]

5. Where the personal property of two tenants in common is levied on, by a sheriff, under an execution against only one of them, and is replevied by the other, it is competent for the latter to prove, that at the time he so replevied the property, "he claimed to be owner of one half" of the property. So it is competent for him also to prove, that on the day of sale, after he returned the property to the sheriff, that at the sale he made the same claim—and that the half so claimed by him was not sold by the sheriff. A stranger, or trespasser cannot object to such evidence. [2 Saund. R. 132; Fowler v. Down, 1 Bos. & Pul. Rep. 46.]

6. Where the personal property of two such tenants is sold by the sheriff under a *fi. fa.* against one only, the sheriff is liable in trover or trespass to the other. And his *official act* in declining to sell one half the interest of the property, is proper evidence against the tenant, who was the defendant in execution, or against one claiming under that tenant, or against a mere wrong doer. [Waddell v. Cook, 2 Hill's N. Y. Rep. 47; Rains v. McNairy, 4 Humph. R. 358.]

L. E. PARSONS, for the defendants in error, argued—

1. The general property of goods levied on by execution is in the debtor. The special property is in the officer who levies. There is no intermediate property. [Dillenback v. Jerome, 7 Cow. 294; Barker v. Miller, 6 John. 196; Gordon v. Harper, 7 T. Rep. 12; Ludden v. Leavett, 9 Mass. 104; Warren v. Leland, 9 Ib. 265; Whitter v. Smith, 11 Ib. 211; Waterman v. Robinson, 5 Mass. 303; The Commonwealth v. Morse, 14 Ib. 217.]

2. The declaration of Cox, that he owned and claimed one

half the property, was properly excluded. A party cannot be permitted to make evidence for himself in this manner.

3. The last charge given by the court was a full protection to any title which the plaintiff had established.

GOLDTHWAITE, J.—1. With reference to that portion of the deposition excluded by the court, it is unnecessary to say more, than that the declarations of the plaintiff in regard to the property, made after the trespass complained of, in our judgment, were not admissible as part of the *res gesta*. The circumstance, that the plaintiff became the bailee of the sheriff, after his levy on the property as belonging to Herndon, had been explained by the plaintiff's assertion of title to a moiety, and its recognition by that officer. This assertion could derive no additional strength from the continued assertion, nor was any fact disclosed to weaken the former claim, so as to render the continued assertion a part of any subsequent transaction in relation to the same property. His declaration then, at the time of the sale, stands unconnected with any matter then transpiring, as entirely as it would, if the sale had been of a different chattel. There is no error in this particular.

2. The charge that the official act of the sheriff, in not selling the entire property, was no evidence of the plaintiff's right, we understand as referring to what took place at the sale day. Certainly, if the plaintiff's declarations at that time, inducing the action then had, are not admissible, the concession of their truth by the officer, was not a circumstance to go to the jury. In truth these matters stand on precisely the same ground, and have no more connection with the question of title, than would the plaintiff's assertion, and a concession of it by a third person, at any other time or place, after the trespass. The test of their inadmissibility is, that both the one and the other could be made, or induced to suit a particular emergency.

3. The other charge on which the case seems to have been decided, assumes, that if the plaintiff showed no other title to the property than that derived from its deposit in his possession by the sheriff of Benton, that the action could not be sustained—or in other terms, that he must, under such

circumstances be considered as the mere servant of that officer; and that the suit for the wrongful taking should be in his name. It is thus argued in this court; and many of the cases cited from Massachusetts and New York sustain this precise position. We infer that in neither of those States is there enactments authorizing the sheriff to surrender property levied on, to the defendant, on replevy or forthcoming bonds; and presume, that in both, this officer is responsible, as at common law, for the custody of property when seized under process. That the officer may constitute a bailee for property when seized, is not an open question, and he may lawfully contract with the bailee to keep it safe, or to deliver it, either at a fixed period, or on demand: [Whitsett v. Womack, 8 Ala. Rep. 466.] The effect of a statutory replevy, or rather delivery bond, was somewhat considered in *Rives v. Wellborn*, 6 Ala. Rep. 45, where it was held the giving of such a bond, invested the surety of the defendant in attachment with a sufficient title to authorize a claim when the same property, before the time of delivery, was afterwards levied on by a subsequent execution, on the ground that by the first levy the property was placed within the custody of the law, and could not afterwards be levied on. My own impression, (and I speak entirely for myself,) has been, ever since this decision, that the statutes would have been better carried out by recognizing the validity of a subsequent levy by the same sheriff, or a succeeding one, and holding that to be a discharge of the delivery bond; which I understand to be the effect of the previous decision in *McRae v. McLean*, 3 Porter, 138. However this may be, it is certain the decision in *Rives v. Wellborn*, goes no farther than the holding, that property delivered on the statutory delivery or forthcoming bond, is, notwithstanding, in custody of the law; and we apprehend, the effect of any other bailment must be, that the sheriff is in precisely the same condition with respect to the defendant in execution or attachment, and other subsequent attaching creditors, as he would be if no bailment had been made. We say, with respect to the defendant, whose goods are seized, and other subsequent creditors, because we do not well see how a sheriff can affect their rights by a bailment to a stranger. Yet, as between himself

and his bailee, we do not perceive any valid reason why he may not bind himself not to call for the re-delivery until the expiration of a definite period. Such a bailment was adjudged a legal one in *Whitsett v. Womack*, before cited; and it is now said, (and so many of the cases referred to by the defendant, hold,) that such a bailee cannot maintain an action in his own name against a wrong doer, but that the action for the redress of an injury to the possession of the bailee must be in the name of the sheriff. In the principal case cited to sustain this proposition, and where all the others are examined, it is said, the defendant in execution has the general property, and the sheriff only a special property. Hence it is inferred there is no intermediate condition, so as to authorize the sheriff's bailee to sue. [7 Cowen, 294.] This seems to us a mistaken view of the subject, for can it be said that one who has only a special property is unable to bail the thing to another? It does not admit of question, we think, that the sheriff may require his bailee to deliver the thing bailed according to the contract and that he is under no legal obligation to pursue one who takes the property from the bailee, unless this obligation arises out of the terms of the contract. If then he pursues his bailee to a recovery, can it be said the bailee is without remedy? We are free to admit, that the custody of a mere servant will not enable him to maintain a suit, but this rests upon the circumstance, that he, as a servant, is not responsible to his master; but on principle it would seem, that whenever there is a liability to the bailor, the bailee is entitled to his action against the wrong doer. This principle governs the decision of this court in *Hare v. Fuller*, 7 Ala. Rep. 717, and is fully recognized by the text writers. See also, *Bac. Ab. Trespass C.*; 1 N. H. Rep. 289; 2 Ib. 56; 3 Conn. 160.

Having come to the result that a bailee is authorized to bring trespass for an injury to the possession, whenever he is amenable himself to the bailor, it remains to consider if such is the position of this plaintiff in regard to the sheriff. That it is, seems clear from the fact, that his liability was not only

conceded, but provided for by the deposit of money, which would have been forfeited if the property was not returned. This view shows the error of the charge we are considering, and its effect must be a reversal of the judgment.

Judgment reversed and cause remanded.

PEARSON v. HOWE.

1. The refusal of the primary court, to permit a party to prove the contents of certain advertisements and hand bills, presents no question, unless it is shown what their contents were.
2. An innocent holder for value of an acceptance, improperly made by a member of a firm, by his indorsement of the bill, transfers all his rights to his indorsee, who will not therefore be required to show when he acquired the bill, or that he gave value for it.

Error to the Circuit Court of Pickens.

ASSUMPSIT by the defendant in error, as indorsee, against the plaintiff as acceptor of a bill of exchange.

Upon the trial, the plaintiff produced the bill described in the declaration, accepted by Child, Hibler & Pearson, and proved, that the latter was a member of the firm, doing business in Mobile as commission merchants, at the time of the acceptance, and that some commission merchants were there in the habit of accepting bills for their customers.

The defendant then introduced William Castles as a witness, and proved by him, that he drew the bill, and obtained the acceptance under the following circumstances: Child being indebted to witness, the latter went to Mobile to obtain payment, when Child offered to give him the acceptance of the firm for any goods he might wish to buy in Mobile. Witness bought a lot of groceries of one Field, in whose favor a

bill was drawn by witness, the acceptance obtained by him, and delivered to Field, who had no knowledge of the arrangement between witness and Child. Witness was not a customer of Child, Hibler & Pearson, and had no funds in their hands. Field resided in Mobile, a short distance from the house of Child, Hibler & Pearson, who were cotton commission merchants.

Defendant produced a witness, and proposed to prove by him, that he had seen an advertisement in the newspapers, and in handbills, published by Child, Hibler & Pearson in Mobile, at the time they formed their partnership in 1838, or 1839, and proposed to prove by him the contents of the advertisement, which being objected to, was rejected by the court, and the defendant excepted.

Upon these facts the court charged the jury, that if from the testimony they believed, it was customary for commission merchants to accept bills of exchange for their customers, they might infer that Child had authority to accept this bill, in the name of his firm.

The defendant moved the court to charge, that a co-partnership whose general leading business, was receiving and selling cotton on commission, was not such a partnership as would authorize them to infer that the individual members of the firm had authority to accept bills in the firm name; which the court refused to give, and further charged, that they might infer from the blank indorsement, that it came to the plaintiff's hands before maturity, and that if such was the fact, and he was an innocent holder without notice, they must find for him.

The defendant then asked the court to charge, that if the jury believed Child had no authority to bind the defendant by his acceptance, and he had not since assented to it, then the plaintiff, though an innocent holder, could not recover, and was in no better condition than Field would be in, if he were suing; which the court refused. To all which the defendant excepted, and now assigns as error.

PECK & CLARK, for the plaintiff in error:

1. The evidence offered to prove the advertisements in the newspapers, and in the handbills published by Child, Hibler

& Pearson in the city of Mobile, should have been admitted; and if the defendant below had failed by other evidence to bring the knowledge of the said advertisements to the plaintiff below, it would then have been competent for the court, either to have excluded it from the jury, or charged them to disregard it. [Driver v. Spence, 1 Ala. N. S. 540; Smith v. Armstead, 7 Id. N. S. 698.]

2. The first charge given by the court to the jury, is wholly unauthorized by the evidence. The evidence is, that the firm of Child, Hibler & Pearson was then doing business as commission merchants in Mobile, and that some commission merchants in Mobile, were then in the habit of accepting bills for their customers. This evidence most clearly did not even tend to prove a custom. [Langford v. Cummings & Cooper, 4 Ala. N. S. 46-49.]

3. The acceptance in this case being clearly proved to have been made by Child in fraud of his co-partners, the holder was bound to show that he had given value for the bill. [Chitty on Bills, 6 Am. fm. 6 Lon. ed. 31, and note c, and the cases there cited.]

4. The mere fact that a bill of exchange is indorsed in blank, is no evidence from which a jury may infer that it came from the plaintiff's hands before its maturity. The court therefore erred in charging the jury that it was a fact from which such an inference might be drawn; and the more so, because, a bill transferred after it is due, carries a presumption of fraud. [Chitty on Bills, ed. above named, 127, and the cases cited; Story on Bills, § 220.]

5. The court erred in refusing to charge the jury that a co-partnership whose general business was that of receiving cotton and selling the same for its customers on commission, was not such a co-partnership as would authorize them to infer from its character, that the individual members had authority to accept bills in the firm name. The rule is otherwise where the co-partnership is a general one. [Chitty on Bills, 35, note n.]

J. B. CLARK, contra.

1. The bill of exceptions not disclosing the contents of the advertisements refused in evidence, this court cannot say

whether the refusal to admit them was erroneous or not. [1 Ala. R. N. S. 517, 521; 7 Ib. 20, 29.]

2. The law in regard to the rights and liabilities of the partners of a firm in the cotton commission business in Mobile, is the same as in any other partnership. [6 Ala. R. 92; Story on Partnership, 106, 107, § 74, 75.]

3. It was not incumbent on the plaintiff in the court below to show that the acceptance was for a partnership transaction. The law will intend that it was made on account of the partnership; and if it was not, but was made for the individual debt of the member of the firm who made it, and that with the knowledge of Field the payee, this ought to have been shown in defence by the plaintiff in error. [7 Ala. R. 20, 27; 2 Ala. 503, 512; 6 Ala. R. 92, 94; 11 T. R. 544, 546-7, marg.; 7 East, 210; 8 Vesey, 542; Chit. on Bills, 8 Am. fm. 8 Lon. ed. 46, note z.]

4. The presumption of law is that the bill was endorsed before maturity. [8 Wend. R. 600.]

5. It being shown by the evidence that Field the payee was no party to the fraud, his subsequent knowledge of its existence would not invalidate the bill in his hands. [7 East, 210.]

6. If the bill was taken *bona fide* by Field, his right to put it in circulation was complete, and by indorsing it he transferred to his indorsee a valid title. Therefore, there was no reason why the indorsee, to enable him to recover, should show he gave value for the bill.

7. The plaintiff in error not having sustained any injury by the charges given or those refused to be given by the court, this court will not reverse even should the charge given on the refusal to charge be improper. [9 Porter, 403; 8 Ala. R. 607; Ib. 889.]

ORMOND, J.—The point attempted to be raised, upon the refusal of the court to permit the contents of certain advertisements and handbills to be proved, is not presented in such a manner, that the action of the primary court can be here reviewed. It is not stated what the advertisements and handbills contained, and without a knowledge of this fact, it is manifest it cannot be known whether the court acted cor-

rectly or not in rejecting them. For any thing shown in the bill of exceptions, the action of the court may have been strictly correct; we certainly cannot be expected to presume that it is not.

The admission of the testimony to prove a custom in Mobile, that commission merchants were in the habit of accepting bills for their customers, may have been insufficient to prove a custom; but this, if an error, could not possibly prejudice the defendant, as such a power was inferrible as matter of law, from the nature of the partnership, as was held in reference to this firm in *Hibler & Pearson v. De Forrest, Morris & Wilkins*, 6 Ala. 92.

When suspicion is cast upon a mercantile security, by proof that it was made without consideration, or has been fraudulently or improperly put into circulation, the holder, before he can recover, must prove that he gave value for it, and acquired it before it was dishonored. [*Marston v. Forward*, 5 Ala. R. 347; *Thompson v. Armstrong*, 7 Ala. 256; *Heath v. Sansom & Evans*, 2 Barn. & Al. 291.] That proof is very satisfactorily made in this cause, as it is shown to have been an arrangement between the drawee, and Child, one of the firm, to pay the private debt of Child with the effects of the firm in which he was a partner, without the knowledge or consent of his co-partners. But it is equally certain from the proof, that Field furnished his goods upon the faith of this acceptance, and without any knowledge of the improper conduct of Child, or of any fact calculated to put him on inquiry as to the character of the acceptance. He is therefore an innocent holder for value, and it results necessarily, that he imparted all his rights to the plaintiff, by his endorsement of the note to him. It is therefore unimportant to inquire in this case, as to the presumption from a blank indorsement, of the time when it was made.

This is decisive of the entire case, and although some of the charges of the court may not be critically accurate, the defendant was not prejudiced thereby, as the court would have been justified in telling the jury, that upon the defendant's evidence, in connection with the note and indorsement, the plaintiff was entitled to recover.

Let the judgment be affirmed.

MARTIN v. EVERETT.

1. If an overseer so acts in the business of his employer as to authorize his dismissal, yet if the employer, with a knowledge of the fact, overlooks the impropriety, and retains the overseer in his service for months, he cannot then make such misconduct an excuse for discharging him, in the absence of a cause subsequently occurring,
2. Where an overseer employed by the year, is discharged before the termination of that period, without a sufficient excuse therefor, he may immediately institute his action for a breach of the contract, and recover not only the damages which then shall have accrued, but such as shall have developed themselves up to the time of the trial.

Writ of Error to the Circuit Court of Perry.

THIS was an action of assumpsit at the suit of the defendant in error. The cause was tried by a jury, who returned a verdict for the plaintiff, on which judgment was rendered. From a bill of exceptions sealed at the instance of the defendant, it appears that evidence was adduced tending to prove that the defendant employed the plaintiff as an overseer for twelve months, from the 1st day of February, 1845, at \$25 per month, or \$300 per year; but other testimony was offered, showing that the defendant hired the plaintiff by the month, at \$25, and that the latter entered upon the service of the defendant, and so continued up to 9th of September, 1845, when the defendant discharged him for being absent from his plantation on business, and refused to allow him to continue his employment.

Defendant introduced proof showing that the plaintiff had treated one of his slaves cruelly, in April or May, preceding his dismissal, and that a short time previous to the 9th of September, he absented himself for a day or two from defendant's business without in his consent.

Plaintiff proved, that if he had maltreated the defendant's slave, the defendant had waived all objection he may have

had to him for that cause ; and further, that he had not abandoned, or unduly neglected the defendant's business.

The court charged the jury, that if the contract was, that the plaintiff should serve the defendant by the month, at \$25, then the plaintiff was entitled to recover at that rate for the time he served. But if he was to serve the defendant one year for \$300, then the plaintiff could not recover on such a contract in this action—the same being instituted within the year.

Whether the contract was entire or not, if the plaintiff served the defendant according to his undertaking, until the 9th of September, 1845, and was then discharged without any fault on his part, then he was entitled to recover the value of his services for the time he served.

The defendant's counsel prayed the court to charge the jury, that if the contract was entire for services as an overseer for one year, commencing on the 1st February, 1845, at the price of \$300 a year, then this action was prematurely commenced on the 22d September, 1845, and the plaintiff could not recover, although he was discharged without a cause at the time shown by the proof. This charge was refused.

Further, if the plaintiff, in May, 1845, treated the defendant's slave cruelly, the jury might, from all the evidence consider whether the defendant waived his objection on that ground, or whether that act of cruelty was so connected with other objections reaching down to the 9th September, 1845, as to justify the plaintiff's discharge. This was in like manner refused ; and the jury were charged, that if the plaintiff inflicted cruel punishment on the defendant's slave, and the latter afterwards continued him for months in his employment, he thereby waived all right to discharge him for that cause.

A. GRAHAM, (of Perry,) for the plaintiff in error, contended, that the contract was entire for a year, and if the overseer was discharged without a cause; he could not maintain an action before the end of the year, and the objection that the suit was prematurely brought is available under the general issue. [1 Stew. R. 29 ; 4 Ala. Rep. 336 ; 9 Id. 754.] Davis

v. Ayres, 9 Ala. Rep. 292, does not oppose this view. The charge in respect to the effect of the cruel treatment of the defendant's slave, withdraws from the jury the consideration of a fact. [9 Ala. Rep. 108.]

I. W. GARROTT, for the defendant in error. Conceding the entirety of the contract, and yet the plaintiff was entitled to sue immediately his service was terminated, if the discharge was without a cause. [8 Porter's Rep. 253.] As for the cruel treatment of the slave, if it ever occurred, the subsequent acceptance of the plaintiff's services was an implied waiver of all objection for that cause. [9 Ala. Rep. 106.] The action was certainly maintainable as soon as the plaintiff was dismissed, if his dismissal was causeless—not perhaps for wages, if the employment was for a year, but for a breach of contract. [9 Ala. Rep. 292.]

COLLIER, C. J.—Conceding that the evidence may have shown some neglect of duty, on the part of the plaintiff, after the maltreatment of the slave in April or May, and previous to the neglect which induced his dismissal in September, yet if the defendant overlooked that outrage, and still continued the plaintiff in his employment, he could not justify his action, some four months afterwards upon that ground. In *Roberts v. Brownrigg*, 9 Ala. Rep. 106, we said, that drunkenness would authorize an employer to dismiss his overseer, but that a single act of intemperance would be considered as forgiven, if he was afterwards permitted to remain on the plantation. "It could not be tolerated that the employer should pass over such an offence, until such period as suited his convenience, and then give this as a reason for putting an end to the contract. The injustice of this will be apparent, when it is considered that if the overseer is rightfully dismissed, he forfeits all right to the wages which have accrued at the time of his dismissal, when the contract, as in this case, is entire. The obligations of good faith require that the employer should act promptly, when any just cause exists for putting an end to the contract." In the case at bar, but a single act of cruelty was proved or pretended, and between this and the neglect which caused the dismissal

sal of the plaintiff, there does not appear to have been any connection—in fact no particular objectionable act, or omission of duty is shown to have occurred during the intervening period.

The court very properly referred to the jury the question whether the contract of the plaintiff was to serve the defendant for an entire year, or whether it was for service by the month. If it was the latter, then they were informed that he was entitled to recover wages, at the price stipulated, up to the period of his dismissal. Thus far the plaintiff in error does not controvert the ruling of the circuit court. But he insists that the jury should have been charged, that although the plaintiff was discharged without sufficient cause, yet if the time for which his services were to continue, had not expired, the action was commenced prematurely, and he was not entitled to recover.

In *Davis v. Ayres*, 9 Ala. Rep. 292, we held upon full consideration, that where a party stipulated with another to pay him fifty dollars *per month*, for four months, for his services as a clerk in a store, and then refuses to allow the services to be performed, without a sufficient cause, the party engaged as a clerk, may immediately commence an action against his employer, and recover not only the damages sustained by the breach of contract, at the time the suit was brought, but such as may be developed up to the trial. The declaration in the case before us contains several counts, at least one of which alleges the breach of contract according to the proof; and the case cited is therefore decisive in favor of the plaintiff's right to sue before the end of the year, if he was causelessly dismissed. Whether, if the plaintiff had declared alone for the wages agreed upon, as if he had performed, or been willing to perform his contract, he should not have awaited the expiration of the year before instituting his suit, is a question which need not be considered.

It follows that the errors insisted on are not available. The judgment is consequently affirmed.

BOWEN v. SNELL, USE, &c.

1. Where the plea asserts the interest in a suit is in a stranger to the record and sets up a set off against him, his declarations that the interest still continues, and that the debt was put in the hands of the plaintiff of record, to get it beyond the reach of creditors, are admissible, though made during the pendency of the suit, it being shown by other evidence, that he is the party in interest.
2. Notwithstanding a set off may be asserted against the actual party in interest, yet it is necessary to show against that party a cause of action for what the defendant could sue him in his own name.

Writ of Error to the County Court of Butler.

ASSUMPSIT in the name of Snell, for the use of Watkins Salter. The defendant pleaded—1. Non assumpsit; and 2. A special plea; asserting the actual ownership and interest in the note sued on to be in John G. Salter, and alledging his indebtedness to the defendant, by means of a note made to Caley and Stewart, and by them indorsed. At the trial, the defendant produced a witness, who testified he had formerly owned the note sued on, but had traded it to John G. Salter, for a slave owned by him. Watkins Salter, the beneficial plaintiff on the record, was not present when the trade was made, and had nothing to do with it. When John G. Salter received the note, he wrote on the back, “transferred to Watkins Salter, March 12, 1844,” and asked the witness to sign it, saying, this is for Watkins Salter, and said nothing more. Witness signed the transfer, and a few days afterwards saw Watkins Salter, whom he told what had been done. Watkins Salter replied, he could not see what the motive of John G. Salter was, in causing the transfer to be made to him—that John G. Salter was indebted to him, but not to the amount of the note.

The defendant then put in evidence the note and indorsement described in his plea of set off, and proved the several

signatures, as well as the delivery of the note to him, some three years before the commencement of this suit. The evidence in the cause showed, Watkins Salter was in possession of the note, as early as May or June, 1844, but there was no evidence how it came to his possession, or that he had paid John G. Salter any thing for it. Suit was commenced the 6th June, 1844, and the note sued on does not appear to be indorsed by Snell, the nominal plaintiff, and is dated 13th March, 1843, payable on the 1st March, 1844.

The defendant then proposed to prove by another witness, that John G. Salter told him, the note sued on was his property, and that he had placed it in Watkins Salter's hands to get it beyond the reach of his creditors. The testimony was objected to by the plaintiff, and ruled out by the court.

The defendant proposed to prove by another witness, that after the suit in this cause was commenced, John G. Salter said to him, the note in suit was his property, and the judgment, when obtained, would belong to him. This testimony was also objected to, and ruled out by the court.

The defendant excepted to these rulings of the court, and they are now assigned as error.

JUDGE, for the plaintiff in error, insisted, the cause was covered by the previous decision of *Bowen v. Snell*, 9 Ala. Rep. 481. He conceded the mere declarations of the interested party would not be sufficient to establish the interest, but that being established by other proof, the declarations afterwards made are admissible.

WATTS, contra, argued—

1. The declarations of John G. Salter, were not admissible to prove ownership in the note, as they were made after parting with its possession. [*Butler v. Damon*, 15 Mass. 223; *Baker v. Briggs*, 8 Pick. 122; *Osgood v. Manhattan Co.* 3 Cowen, 612; *Copeland v. Clark*, 2 Ala. Rep. 388; *Borland v. Mayo*, 8 110; *Oden v. Rippeto*, 4 Ib. 68; *Head v. Shaver*, 9 Ib. 791; *Reichart v. Costater*, 5 Binney, 109; *Greenl. on Ev.* 203, 223.]

2. He submitted whether the court would not review the

former decision, made when the cause was here at another term, for the reason that several decisions seem to conflict with the opinion then delivered. [Bell v. Horton, 1 Ala. R. 413; Gary v. James, 7 Ib. 640.]

GOLDTHWAITE, J.—1. On the first examination of this record, we fell into the mistake of supposing the court below rejected the entire evidence of the defendant, when it seems the fact is, that nothing was rejected except the testimony of witnesses speaking to the admissions of John G. Salter, after the institution of the suit. It is not entirely certain, that in reviewing the cause on this assumption, we may not run counter to the truth of the case, but we think the fair construction of the bill of exceptions is, that nothing more was excluded from the jury than what the defendant proposed to show by the last two witnesses examined. We are then required to ascertain whether, under the circumstances in proof, the declarations of John G. Salter, made after the institution of the suit were competent. If this individual was a mere stranger to the suit, we presume no one would insist his declarations were good for any purpose; but in the case there was direct proof that he was the party really interested in the suit, and there was none whatever of any interest in the *use* introduced by the writ. The general rule on this subject is thus stated, by a very exact writer on evidence: "The law in regard to this source of evidence looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties on the record. Thus the admissions of the *cestui que trust* of a bond; those of the persons interested in a policy of insurance effected in another's name for their benefit; those of all the ship owners in an action by the master for freight; those of the indemnifying creditor in an action against the sheriff, &c. &c., are all receivable against the party making them. And in general, the admissions of any party represented by another, are receivable in evidence against the representative." The only limitation stated by the author is, that the admissions must have been made during the continuance of the interest. [Greenl. Ev. § 180.] The difficulty here, how-

ever, is not in ascertaining the rule, but in its application to the particular case. We do not well see of what value the admission that the note was placed in the hands of the *usee* to get it beyond the reach of creditors, could be to the defendant, unless it was to weaken whatever impression had been made by the statement of Watkins Salter, that John G. was indebted to him, when supposing a motive for his conduct in the transaction. An impression of this fact on the jury might not be without weight, and we are not prepared to say it was not proper to remove it, by showing the declarations of John G. Salter, subsequent to the suit, that he intended to make a different disposition of the money. The only case to which our attention has been directed, in which the precise question seems to have been raised, is, *Reichart v. Costator*, 5 Binney, 109. There, the declarations of the grantor, made after the deed, *that it was done only as a sham, so that the people should not come at the land*, was offered against the grantee. The court held this declaration was improperly admitted, as no preliminary evidence of fraud was given. One of the judges declines to express any opinion how far evidence of fraud would let in the declaration, but another asserts with such a predicate it would be admissible. In this case we apprehend the inference, from the evidence before the jury, is, that one of the parties attempted a fraudulent transfer of the note in suit, and in this was aided by the other. Now we can perceive no sound reason against the admission of these declarations, except the use which might be made of them if the evidence of a trust in Watkins Salter was defective. In principle, they rest on the general rule above quoted from Mr. Greenleaf, and all evidence under this rule is liable to precisely the same objection, *that is*, of being of no value whatever, if the preliminary proof of interest is either unsatisfactory or disproved. There can be no question that the admission of the party in interest, of a substantial defence, or, as in this case, of a set off, is competent evidence but its effect on the action depends on the jury's being satisfied that the interest is as asserted. The cases cited with respect to the rejection of admissions by nominal parties, have but a remote bearing on this case, as we apprehend they are entirely within the principle of the rule as soon as their nominal in-

terest is shown to be a real one. See *Brown v. Foster*, 4 Ala. R. 282; *Copeland v. Clark*, 2 Ib. 388; *Head v. Shaver*, 9 Ib. 791; *Chisholm v. Newton*, 1 Ib. 371.

The circumstance that all defences made out by evidence of such admissions rest upon the determination of a previous question by the jury, does not touch their competency, though it in all cases imposes upon the court the duty to charge, when requested, that the entire effect they should have, depends on the other fact, that the interest is ascertained. On the whole, we think the evidence was competent, and therefore was improperly rejected.

2. On the other point in the cause, we deem it only necessary to say, that we remain satisfied with our former decision in this case. [See 9 Ala. Rep. 481.] We do not there, as the counsel supposes, depart from the principle settled in *Bell v. Horton*, 1 Ala. Rep. 413; *Gary v. James*, 7 Ib. 640, and many other cases where we have held a set off available to a defendant, must be one on which he could sue in his own name. This case is not of that nature, for here the set off might be sued in the name of the defendant, because the note proposed to be set off is regularly indorsed to him.

Although the reasons for the reversal are different from those which were first announced, the result is the same.

Judgment reversed and cause remanded.

SLEDGE, EX'R, v. TUBB.

1. T. being indebted to S, in a sum of money secured by note, left the amount in the hands of L. & L. of Mobile, to take up the note. On being written to by the attorneys of S. for the money, T. informed them of the deposit with L. & L. and asked them to call and receive the money. After this, the attorneys of S. brought suit against L. & L. in the name

of S. and recovered judgment, but which was not satisfied, they being insolvent: *Held*, that these facts did not establish a payment of the debt.

Error to the County Court of Perry.

ASSUMPSIT by the plaintiff, against the defendant in error, on a promissory note for \$225, dated 25th April, 1837, and due nine months after date. The defendant relied on a payment.

From a bill of exceptions, it appears, that on the 30th April, 1838, the defendant deposited with Lea & Langdon of Mobile, \$235, taking from them a receipt to apply the money in payment of a note for \$225, given by the defendant to plaintiff's testator, then in the hands of H. I. Thornton, of Mobile. There was evidence conducing to prove, that the note here referred to was the one in suit, but none that the plaintiff's testator knew of, or assented to the arrangement, or that Lea & Langdon paid over the money. The defendant also proved, that an action of assumpsit was brought in Mobile, in the name of the plaintiff, against Lea & Langdon, by Stewart & Easton, who it was proved were lawyers, and succeeded the firm of which H. I. Thornton was a member, and a judgment recovered thereon for \$238 73. It was admitted this judgment had never been paid, and that Lea & Langdon were bankrupts, and insolvent.

The plaintiff produced and read a letter from defendant, addressed to Messrs. Stewart, Thornton & Easton, dated 6th August, 1838, as follows: "I received your letter informing me, that you had my note given to Sledge, for which I am much obliged. I deposited funds in the hands of Lea & Langdon last April, to cancel this debt, and presume they must have forgotten to apply for the note. I have written them this day to call on you and settle it. If they do not call on you, please call on them, as I am sure you will at once be paid."

Upon this testimony, the court charged the jury, that if they believed that the judgment was for the money left with Lea & Langdon to pay the note, then whether the judgment

was satisfied or not, it was a payment of the note by the defendant, or equivalent thereto; and that plaintiff could not obtain another judgment on the note for the same debt. To which the plaintiff excepted, and which he now assigns as error.

A. GRAHAM, of Perry, for plaintiff in error, insisted that the deposit of the money with Lea & Langdon was not a payment, unless assented to by the plaintiff. [Swift v. Hathaway, 1 Gal. 417; Wheeler v. Guild, 20 Pick. 545.]

A note is not a payment of a precedent debt, unless agreed to be received as such.

A. B. MOORE and I. W. GARROTT, contra.

The money was not placed in the hands of Lea & Langdon as collateral security, but for payment, and if the agency of Lea & Langdon was recognized, it was a payment. [Coffin v. Power, A. N. P. 49.]

The plaintiffs elected to take Lea & Langdon for their debt, as is shown by their having instituted suit against them, and their having failed to sue for nearly six years. [Whitlock v. Van Ness, 11 Johns. 409; Breed v. Cook, 15 Id. 241.]

ORMOND, J.—From the testimony in the cause, it is manifest that Lea & Langdon were the agents of the defendant, in the receipt of the money deposited with them for the payment of the note in suit, and to cast the loss upon the plaintiff, it must be shown that he agreed to receive the money in their hands as a payment of the debt. It is contended by the counsel for the defendant, that the commencement of a suit against Lea & Langdon for the use of the plaintiffs, and the judgment obtained is such an election. If it were conceded, that the suit being brought by the attorneys of the plaintiff, with whom the note was lodged for collection, authorized the inference that he directed it to be brought, it would not be evidence of an election to take Lea & Langdon for the debt, as that act is entirely consistent with the continuing liability of the defendant. To discharge the defendant from liability on this note, he must prove either that the

money has been paid by Lea & Langdon, or that the plaintiff agreed to accept the money in their hands as a payment and discharge of this note. The facts in proof authorized no such inference.

Judgment reversed and cause remanded.

HOOT, ET AL. V. SORRELL, ET AL.

1. The right of dower depending upon the wife's surviving the husband, may be gratuitously renounced in favor of her husband, or she may require something to be paid for it, or property to be conveyed to her separate use, as an inducement to her relinquishment.
2. Where the wife, as an inducement to relinquish her contingent right of dower, stipulates for the settlement of personal property to her separate use, which is worth half as much as the lands are sold for, the transaction will not be adjudged void, in the absence of proof implicating the wife in a want of good faith, merely because the property settled is of greater value than the consideration given for the settlement.
3. The profits derived by the wife from her separate estate are her property, and may be disposed of, or invested by her as she pleases; and property which she acquires by purchase with her income, is not subject to the payment of his debts; especially if she has not allowed it to go into his hands, or be subject to his control.
4. Where the husband furnishes lumber, which the wife voluntarily allows to be used in erecting buildings on her separate estate, if the husband is in embarrassed circumstances at the time, this will be considered a gift to the wife in fraud of his creditors, and the latter may thus far make the wife's estate liable to pay their demands.
5. If the husband merely expends his personal labor in the improvement of his wife's estate, the estate is not thereby made a debtor to the husband, nor can the creditors of the latter charge it with the value of the labor.
6. Upon a bill by the creditors of the husband to charge the wife's estate (among other things,) with the value of lumber furnished by the husband towards its improvement, the lumber must be estimated according to its value when the bill was filed; and to collect the amount with which the wife's estate is charged, the decree should not direct a sale, but the estate should be leased for term a sufficiently long to extinguish the charge.

Writ of Error to the Court of Chancery for Dallas county.

THE plaintiff, Mrs. Catherine Hoot, by her next friend, Julius Sneed, filed her bill, setting forth that her husband sold to John Shields, in February, 1838, certain lands situated in Dallas, in which she was entitled to a right of dower, and which she was unwilling to relinquish, unless an equivalent was given her therefor; that it was thereupon agreed between Shields, her husband, and herself, if she would relinquish her dower to these lands, that then Shields and her husband would redeem a female slave named Milley, and her six children, which had been mortgaged by the husband to John S. McGuire, and would convey the same to her and her lawful issue, free from the claim of them, (Shields and Hoot.) In compliance with this agreement, she did, at the time of such sale, relinquish to Shields her right to dower; and afterwards he and her husband did redeem these slaves from that mortgage; and on the 23d day of August, 1838, conveyed by deed Milley and her children to Isaac N. Campbell, in consideration of the premises; *upon trust*, that he would permit the complainant to possess, control, and enjoy the use of these slaves, and their increase, and all profit derivable therefrom, to her own proper use, during her natural life; free from the control of her husband, the trustee, and all other persons: *Upon the further trust*, that upon complainant's death, the trustee would convey the title of the slaves, or such of them as were then living, to her lawful issue then living, and to the issue, if any, of such as were dead, to be divided according to the statute of distributions of this, or such other State as she, complainant, might reside in at the time of her death. This deed is made an exhibit to the bill, and prayed to be taken as a part thereof.

About the time of the sale to Shields, Hoot, the husband, conveyed about four hundred acres of land to Messrs. Perrine & Crocheron, to whom complainant relinquished her dower, as a part of the consideration of the deed of trust to Campbell, though it is not recited therein.

It is also alledged, that Mary Eleazur, the complainant's mother, then living in South Carolina, sent her four hundred dollars, as a donation, which sum she placed in the hands of

her husband, who invested it in the lands sold to Shields. She therefore insists that she was entitled to the land purchased with her money, free from the claim of her husband or his creditors.

The complainant's trustee, with her separate funds purchased of Henry Moffitt, through his agent, Jesse Beene, lot No. 40, in the town of Cahawba, for the sum of \$100; which money has been paid, a receipt given therefor, and an undertaking by the agent to make a title. He also purchased with the trust funds a waggon and two horses, five cows and calves, ten feather beds with bedsteads, and ten single mattresses with bedsteads; for all which the evidences of purchase and payment are exhibited.

Isaac N. Campbell has resigned and settled his trust, and Wm. E. Bird been appointed in his stead. The sheriff of Dallas has in his hands executions requiring money to be made of the goods and chattels, &c. of the complainant's husband, viz: one in favor of T. B. Sorrell, another in favor of Bernard Johnson, and a third in favor of Paschal B. Traylor. The execution in favor of Sorrell has actually been levied on the slave Milley, and four of her children, also on the lot No. 40, with the buildings which have been thereon erected by the separate funds of the complainant; and the other executions have been levied on a part, or the whole of the trust property, and forthcoming bonds executed, &c. It is alledged that the trustee refuses to protect the trust estate, by giving bond and security to try the right of property, or in any other way. Therefore it is concluded that the complainant is remediless at law—the sheriff and the plaintiffs in the executions made defendants to the bill, and required to answer the same.

The bill concludes with a prayer for an injunction against selling the trust property levied on, or levying on any more—that it be delivered to the complainant's trustee, under such restrictions as the court may prescribe; and that such farther relief as is appropriate be granted.

Sorrell, Johnson and Traylor, answer the bill at length, averring substantially their belief, that the dower of the complainant in all the lands referred to in her bill, is worth far less than the slaves which she alledges were conveyed to

Campbell in trust; that if any money was ever sent to her by her mother, it passed into the hands of her husband, and became his own. They deny, according to their belief, that the lot was purchased with money, the separate property of the complainant, or that the buildings thereon were thus erected; or that any of the property mentioned in the bill was purchased with her money. But they declare that the conveyance to Campbell in trust, so far as the complainant or her husband had any agency or interest therein, and all the subsequent transactions relied on by the bill were fraudulent—being intended to delay and hinder the creditors of the latter in the collection of their debts.

The defendants, Sorrell, Johnson, and Traylor, filed their bill against the complainant, her husband, and their two sons, and only children, Bird, the trustee of Mrs. Hoot, and Lewis Basset, the lessee of the houses erected on lot No. 40. This bill recites the pendency of the other, &c., impugns the deed by which the slaves are settled upon Mrs. Hoot and her children for fraud, insists that the lot and other property alledged to have been purchased with her separate funds, were paid for with the money of her husband, and that the improvements were made on the lot by him, or through his credit, or money—that the debt on which the judgment in favor of Johnson was rendered, was for lumber furnished to make these improvements, and Traylor's debt was for supplies furnished for the tavern kept therein. It is therefore concluded, that Mrs. Hoot has no separate or exclusive right to the property in question, that her husband being embarrassed, could not make a gift for the benefit of his wife, and that the several transactions are void as it respects his creditors.

The bill prays that an account be taken of the amounts due on the complainant's judgments, that Basset be restrained from paying over the rent to either of the defendants; that all the conveyances in trust may be set aside, and so much of the property delivered up and sold, as will be sufficient to satisfy the complainants their demands, with interest and costs. *Further*, that such other relief as is appropriate be granted, &c.

Jacob Hoot and wife, in their answer, deny all fraud with which they are jointly or individually charged, affirm, that

Hoot, et al. v. Sorrell, et al.

the slave Milley and her children were settled upon the latter as an inducement for her relinquishment of dower in the lands which her husband sold to Shields, that without such settlement she would not have relinquished it: Further, that Mrs. Hoot received from her mother \$400, as a donation, intended for her own use, and to be at her disposal, which her husband invested in the purchase of these lands. They further insist, that she relinquished her right of dower in lands, which the husband sold to Messrs. Perrine & Crocheron, and that lot No. 40, was paid for by Messrs. Perrine & Crocheron, in consideration that Mrs. Hoot would relinquish her dower in certain lands which her husband had sold to D. & C. Ellisor, and the latter to Messrs. P. & C.

These respondents declare, that the improvements were paid for by Mrs. Hoot, with money she had made by keeping a boarding house, and afterwards a tavern, in Cahawba, assisted by the labor and earnings of the slaves which had been settled upon her; and that the other property in question was paid for with her separate funds. They admit the consideration of the indebtedness to Johnson and Traylor to be such as is alledged in the bill, and affirm that the execution in favor of the latter has been fully satisfied by the levy on and sale of property belonging to the defendant therein.

The record is exceedingly voluminous—containing exhibits to sustain all the facts on either side which the pleadings alledge, are shown by documentary evidence, as well as a great number of depositions. The facts proved by the depositions, so far as necessary to be noticed may be thus condensed:

Mrs. Hoot refused to relinquish her right to dower in the lands which her husband sold to Shields, unless Milley and her children were settled upon her, so as to invest her with a separate estate, and free them from liability to her husband's debts. This was assented to, both by her husband and Shields; and thereupon the latter redeemed these slaves from a mortgage made by Jacob Hoot, to John S. McGuire, on which more than \$1,800 were due, and made the conveyance to Campbell, in trust for Mrs. Hoot and her children, as alledged in the bills of the respective parties. The sum paid by Shields upon his purchase was \$3,000. The land purchased by

Messrs. Perrine & Crocheron was sold to them by Jacob Hoot for \$1664; and for joining in the conveyance with her husband, Mrs. Hoot did not require any thing to be paid to her. But Messrs. Perrine & Crocheron purchased of the Ellisors the tract of land which Jacob Hoot had previously sold to them, and she required \$100 to be paid for her right of dower in the same; this sum was paid by Messrs. P. & C. by her direction, to Jesse Beene, as agent of Henry Moffitt, in full for lot No. 40, in the town of Cahawba, under a written agreement by the agent, that he would procure a deed from his principal to Mrs. Hoot's trustee.

In respect to the wagon, horses, cows and calves, beds, mattresses and bedsteads, the proof does not show whose money paid for them. The trustee did not personally superintend the purchases, or furnish the means of paying for them—they were all arranged by Mrs. Hoot, or some one else professedly for her. .

Mrs. Hoot contracted with some of the workmen who were employed in erecting the building on lot No. 40, and settled with them herself—others were employed by her husband, who settled with them. One witness says, ten or fifteen workmen were at different periods employed in working on the buildings—another says twenty—all of whom boarded in the house with Mrs. Hoot and her husband. The cost of the improvements is variously estimated at from \$1200 to \$4000. One of the workmen employed upon them, thinks they were worth \$2000—another \$1500; the former supposes that no more than \$300 or \$400 was paid out in cash, and a third witness that the payments in money did not exceed \$500. By boarding the workmen a considerable saving was made in the expenditure of money.

Many of the witnesses state that Jacob Hoot was frequently seen working on the house, and sometimes apparently giving directions as to the work. One of the workmen employed upon the building, says he sometimes gave orders in respect to it, but it was by the advice and direction of Mrs. H.; he worked on it some, but his labor was not worth much more than his board—that he had several persons about the house.

A witness who was employed by Mrs. Hoot during the year 1840, states that the building was put up much cheaper

by boarding the workmen—that it was two years in being completed, and that the profits of the tavern were appropriated towards paying for it. Jacob Hoot he thinks worked but little upon the improvements, but his wife is economical and industrious. He also testifies that Milley and her children, except the youngest, are able to labor. Their yearly value is variously estimated at from \$125 to \$300.

Henry, the son of Jacob and Mrs. Hoot, worked some on the house—assisting the mason about the chimney and pillars.

One witness states that Mrs. Hoot gave him \$93 or 94, and her trustee, Campbell, 6 or \$7 to enter land for her, and with it he entered a part of that purchased by Shields—but in whose name he made the entry, he does not remember. He also saw Mrs. Hoot pay \$100 for the land which Ellisor sold to Messrs. Perine & Crocheron. Both of these transactions took place after he understood that Mrs. H's mother had sent her money from South Carolina.

It was further proved that Mrs. Hoot opened a boarding house in Cahawba in the fall of 1838, previous to the purchase and improvement of lot No. 40, and continued to keep either that description of a house, or a tavern, until the new establishment was completed. Hoot was a bricklayer—sometimes worked at that business; but most of the witnesses think he was not very profitably employed.

The lease to Basset was at an end, and the possession of the premises abandoned by him. Traylor's execution, the sheriff testifies was returned, satisfied, after the commencement of this suit.

The two bills were heard together upon the exhibits and proofs—the latter being considered a cross bill. The chancellor was of opinion that the value of the slaves settled upon Mrs. Hoot greatly exceeded the value of her right to dower in the several tracts of land mentioned in the bill, yet as its relinquishment formed the consideration of that settlement, he sustained it. But it was considered that the proofs did not support her title to the lot and improvements thereon, or to the other property on which the executions were levied. It was therefore ordered and adjudged that the deed to Campbell for the benefit of Mrs. Hoot and children continue

in full force; and the slaves therein mentioned be held by Wm. E. Bird, as Campbell's successor in the trust. That lot No. 40, with the improvements thereon, and the other property in question, is liable to satisfy the judgments in the cross bill so far as they remain unsatisfied, and that the trustee hold the same for that use and purpose; and that he deliver the same to the register upon demand, or account therefor.

It was further ordered and adjudged, that the register ascertain the amounts due upon the respective judgments for principal, interest and costs; that unless the amounts so reported, be paid within thirty days from the adjournment of the court, together with the costs of this suit, then the register proceed to sell, &c. for cash, so much, &c. as shall be sufficient to pay these several sums: *Further*, that all the right and title of Wm. E. Bird as trustee, and Jacob Hoot and wife, pass to, and be vested in the purchaser.

The complainants in each bill being dissatisfied with the decree, have prosecuted writs of error, and here assign errors.

J. P. SAFFOLD, for the plaintiff in error, made the following points: 1. A court of chancery will not avoid a contract for mere inadequacy of consideration; but to induce its interference, the inequality must be so great as to shock the understanding of mankind, and lead the mind to the conclusion that the transaction is fraudulent. [Story's Eq. 259, § 244-5; 2 Johns. Ch. Rep. 1-23; 14 Johns. Rep. 527; 2 Hill's Ch. Rep. 126; Rice's Eq. Rep. 84; 2 Stew. Rep. 407.]

2. An agreement between husband and wife, though it be by parol, that the former would purchase land, build thereon and convey it to the wife, in consideration that she would unite with him in a deed conveying real estate, and thus relinquish her right of dower, is good, and will be upheld; though the interest which the wife parted with, was worth much less than the land settled upon her in return. [6 Munf. Rep. 1; 4 Id. 251; 1 Rand. Rep. 219; 4 Dess. Rep. 227; 2 Hayw. Rep. 332; 2 Rand. Rep. 563.]

3. The mere fact of an existing indebtedness does not make an absolute conveyance fraudulent or void in law

against pre-existing creditors, if there was no intention to delay or defraud them. [6 Paige's Rep. 62.]

4. An answer responsive to the stating part of the bill, or to an interrogatory intended to elicit a discovery is evidence in his favor, and must be overbalanced by proof in order to do away its effect. [3 Stewt. Rep. 95, 233; 3 Ala. Rep. 478; 4 Id. 60; 10 Yerg. Rep. 59, 105; 2 Rand. Rep. 575; 1 Cow. R. 711.] Affirmations in an answer when responsive, need not be proved; and the answer is conclusive so far as it is a response to a discovery sought of a particular fact. [1 Bibb's Rep. 253; 1 Day's Rep. 156.]

5. Extrinsic evidence is admissible to establish the consideration of a deed which upon its face appears to be voluntary, if it is impeached for fraud; and although a consideration is expressed, it is allowable to prove an additional one, not inconsistent with it. [5 Stew. & P. Rep. 410; 2 Ala. Rep. 602; 1 Rand. Rep. 219; 4 Munf. Rep. 251; 2 Call's Rep. 125; 2 Hill's Ch. Rep. 562; 1 Bail. Eq. Rep. 138.] Some of these citations show that greater indulgence is extended to *femes covert* and infants, than to others who are not compelled to confide so much in others; and that the relinquishment of the wife's estate, or a claim she may have upon her husband's, is a good consideration for a settlement or conveyance of property by the husband for her benefit.

6. The declarations of a party, made after he had executed a deed, are inadmissible to impair its efficacy. [1 Stew. R. 198; 2 Rand. Rep. 576.]

7. Whenever the wife's fortune is under the direction and control of a court of equity, the husband will not be permitted to possess himself of it until he has made a suitable provision for her. [Clancy on Rights, &c. 441; 13 Maine's R. 124; 2 Hill's Ch. Rep. 104.] An unreasonable settlement should not be made with the view of defrauding the husband's creditors; but where he settled less than one-half the estate he acquired by her, it was not thought unreasonable. [2 Hill's Ch. Rep. 566.] Under some circumstances, it would not be unreasonable to give him all. [6 Johns. Ch. Rep. 25; 5 Id. 467.]

8. Where a father gives property to his daughter, a married

woman, the presumption is, that it was intended for her separate use. [4 Dess. Rep. 550.]

9. The wife's equity is to be preferred to the claims of her husband's creditors—property which falls to her during coverture by devise, descent, &c. are not subject to their demands. [5 Monr. Rep. 340.]

10. The separate estate of the wife, is not liable for her general engagements not closed by a note. [Clancy on Rights, &c. 441.] Nor is it liable for the expenses of herself and children under ordinary circumstances. The husband, if able, must support his family, and the wife's property cannot be appropriated to the payment of debts he may contract upon that account. [1 Hill's Ch. Rep. 234.]

11. Although the complainant verifies his bill by an oath, yet the positive denial of the answer will not be overbalanced by the testimony of one witness unsupported by other circumstances; but this rule does not apply where the defendant's means of information are defective, and he gives no good reason for his denial. [4 Stew. & P. Rep. 410.]

12. The complainant ought not to pay costs, because she was compelled to come into this court to protect her rights. [6 Johns. Ch. Rep. 25.]

13. Where a mortgagor applies to a third person to borrow money to pay the debt secured, and promises to give him the same security as the mortgagee then had, if he receives the money and takes an assignment from the mortgagor to the lender, it will be upheld, and considered an available security for the benefit of the latter. [8 Paige's Rep. 173.]

14. A cross bill is generally considered as a mode of defending the suit, and set down for hearing with the original bill as one cause. [1 Hopk. Rep. 58; 4 Johns. Ch. Rep. 357; 7 Id. 252.] But the delay of the complainants in the cross bill to prepare for a hearing will not delay the hearing of the original cause. [2 Paige's Rep. 164.] A cross bill should not be filed after publication, (Story's Eq. Plead. 315); nor can it be sustained on matters which do not grow out of the original bill. [6 Dana's Rep. 186.]

C. G. EDWARDS, for the defendants in the original, and complainants in the cross bill, insisted that the settlement of

the slaves upon Mrs. Hoot cannot be supported. They are confessedly of far greater value than her right to dower in the lands, for which they were given as an equivalent; thus far, then, the deed is without consideration: Besides, the disparity is such as to be evidence of a fraud. Nor is this the only evidence of fraud—taking the entire transaction into view, with the circumstances which preceded and followed it, and there can be no question that not only Jacob Hoot but his wife meditated rather a fraud upon his creditors, than an intention to secure Mrs. H. a legal benefit.

The decree is also erroneous in directing the costs to be paid from the proceeds of the property condemned to the satisfaction of the judgments.

COLLIER, C. J.—The right of dower depending upon the wife's surviving her husband, is regarded as valuable, and protected not only by the common, but by the statute law; and it depends upon her own volition, whether she will yield it up or not. She may gratuitously renounce it in favor of her husband, or may require something to be paid for it, or property to be settled and conveyed to her separate use, as an inducement to her relinquishment. In *Taylor v. Moore*, 2 Rand. Rep. 563, it was decided that if a married woman relinquish her dower in lands, under a promise that other property shall be settled on her as a compensation, such settlement will be good, although made after the relinquishment. See also, 1 Rand. Rep. 219; 4 Munf. Rep. 251; 9 Leigh's Rep. 200.] It has been held, that when a legacy is given to a widow, in lieu of dower, she takes as a purchaser for a valuable consideration, and is entitled to be paid in preference to legatees who are mere volunteers. [6 Metc. R. 50.] So a court of equity has sustained a conveyance by the husband in trust for his wife and her issue, as well as purchases made on her behalf, where the husband has received and applied to the payment of his debts, or other uses, funds or property of the wife; although the value of what the husband appropriated was less than the property settled upon the wife. [4 Dess. Rep. 227; 1 Dev. Eq. Rep. 185.]

It has been supposed that a wife may sell her separate estate to her husband, and with her separate estate may pur-

chase from him, and the purchase will be protected against creditors. [Clancy's *Husb. & W.* 350; 2 *Bro. Ch. Rep.* 51; 2 *Vesey, jr. Rep.* 698; 10 *Ves. Rep.* 139.] Although the husband is not bound to account to the wife for her separate estate which she has permitted to go into his possession, without objection, [Clancy's *H. & W.* 352; 2 *Ves. jr. Rep.* 488; 2 *P. Wms. R.* 82;] but if it was received by him without her knowledge, he was held to be chargeable. [Clan. *H. & W.* 351, 354.] So if the wife advance her separate property as a loan to her husband for the payment of his debts, she is entitled to stand in the place of the creditor. And where the separate money of the wife is applied by the husband in the purchase of an estate, she will be an incumbrance upon it to that extent. [Clan. on *H. & W.* 612; 2 *Atk. R.* 383; 5 *Mad. R.* 414; 10 *Ves. R.* 511.]

In *Huber v. Huber's adm'rs*, 10 *Ohio Rep.* 371, it was held, where money comes to a wife in right of a former husband, and the second husband borrows it from her, and gives her a note for it, the note is good, and after his death she may set it up in equity against him. Even gifts between husband and wife have been supported in equity, although a court of law does not recognize them. [1 *Atk. Rep.* 270.] So where the husband voluntarily allows the wife for her separate use to make a profit of various articles beyond what were used in the family, of which she saved £100, which the husband borrowed; the wife's right to the money will be upheld *against his estate*. [3 *P. Wms. Rep.* 337.] It has been repeatedly held, that a court of equity will sustain a *post nuptial* conveyance by the husband to the separate use of the wife, where the consideration is property received from her. [2 *Rop. on H. & W.* 227; *Reeves Dom. Rel.* 166; 1 *Atk. R.* 269; 10 *Ves. R.* 146; 2 *John. Ch. Rep.* 537; 7 *Johns. Ch. Rep.* 57; 4 *Mason's Rep.* 443.]

In *Picquet v. Swan, et al.* 4 *Mason's Rep.* 443, Judge Story says, "It is common learning that a post-nuptial settlement may be made for a valuable consideration, by a husband upon and for the benefit of his wife. And even a voluntary settlement, without such consideration to support it, would be upheld, if the husband were not in debt at the time, or the settlement were not disproportionate to his means, tak-

Hoot, et al. v. Sorrell, et al.

ing into view his debts and his situation." The learned Judge considered these propositions as so well established, that he does not pretend to discuss them, but merely cites some few of the numerous decisions which establish them. See Kent's Com. 145; Roper on H. & W. ch 8, § 2, pp. 301, 304, 306, 307, 309; 3 Johns. Ch. Rep. 481; 8 Wheat. Rep. 229.] It was insisted in that case, that although the settlement might be valid, yet, the moment the proceeds or income arising from the property secured, were paid by the trustees into the hands of the wife, they ceased to be trust funds, and were immediately liable to the payment of the husband's debts, in the same manner as if they had been her property, not secured by trusts. The court said, "This proposition is utterly untenable in a court of equity. It involves in effect a total defeat of the original trusts. These trusts were to secure the income and proceeds to the sole and separate use of Mrs. Swan, with an unlimited power to dispose of them as a *feme sole*. Nothing is more clear, than that the separate property of a *feme covert*, secured or given to her separate use, will be upheld for her use by a court of equity. Into whosever hands the same may come, whether of a stranger, or even of the husband, if it comes clothed with the trust, and with notice of it, the party so possessing it, becomes a trustee for the *feme covert*. It is in no sense the property of the husband, and can never become his, except by a voluntary appropriation of it to his use, by the wife herself. She may invest it as she pleases; and appropriate it to furniture, or pictures, or plates, or jewelry, or bank stock, or other securities, or personal ornaments, or paraphernalia, still it is her own, and cannot be touched, while she retains her power and dominion over it." Again: "Indeed, the moment courts of equity decided that *femes covert* could hold separate property to their own use as *femes sole*, it was a necessary consequence, that the protection of it should be as universal as the right." See 2 P. Wms. Rep. 316; 3 Bro. Ch. Rep. 7; 9 Ves. Rep. 369; 3 Thomas' Co. Lit. 132, note N.; 3 Id. 309, note O; 314, note R; Atherly on Mar. Set. ch. 21, p. 330; ch. 22, p. 334; 1 Mad. Ch. Prac. 376; 2 Johns. Ch. Rep. 543; 17 Johns. Rep. 548; 2 Kent's Com. 136; 2 Rop. on H. & W. ch 19, pp. 179, 184, 185, 226,

227 ; 3 Harr. Rep. 87 ; 20 Pick. Rep. 556 ; 2 Ired. Rep. 553 ; 5 W. & Sergt. Rep. 494 ; 15 Verm. Rep. 525.

But it is said that the husband is entitled to all sums of money which his wife earns by her skill or labor ; and if he die without having recovered them, they do not survive to her, but his executors shall have them. So he is entitled to money lent by her, or received by a third person on her account during the marriage. [Clan. on H. & W. 3.] This learned author says, that the separate provisions of married women are of two kinds ; first the property which is bequeathed to their separate use ; secondly, the allowance which is made to them by their husbands, before or during marriage, for their maintenance upon a separation. And the difference between the first and second kinds of provision is this, the former being for her separate use, is her separate estate, of which she may dispose as she thinks fit ; but the latter being destined for personal enjoyment, it would be contrary to the intent of its creation, if she were capable of depriving herself of it. If she save money out of her separate estate, the savings are always hers, against all claimants. And if she purchases lands and houses with what she has saved, the court will follow the purchase, and secure it against the husband for her benefit. [pp. 271 to 276.]

In respect to the slaves which were redeemed from the mortgage by Shields and conveyed by him and J. Hoot to a trustee for the benefit of Mrs. Hoot and her children, we think the citations we have made very fully support it. That the relinquishment of the wife's contingent right of dower in the lands of her husband is a sufficient consideration for a settlement, has not been controverted, and we think cannot be successfully gainsayed. True, the slaves were worth half as much as the entire purchase money of the land, and consequently more than the dower of the wife, even if it had been a vested interest. Yet it cannot be affirmed that the transaction was fraudulent. Perhaps it was desirable that the debt secured by the mortgage might be extinguished, and the residue of the purchase money might be turned to a better account than the occupancy of the land by the husband ; so that it was really for his interest to yield to the requisition of his wife. Be this as it may, her contingent right could

only be acquired by her relinquishment. If in good faith she placed an estimate upon it far beyond its true value, we know of no warrant for the imputation of *mala fides*. It cannot be predicated of the disparity in value between what she yielded up and what she received in return. The difference is not under the circumstances of the case so great as to shock the common sense of mankind and furnish in itself conclusive evidence of fraud. If fraud is not a necessary deduction, then the inequality between the property settled and the consideration for the settlement, will not authorize a court of equity to set it aside. [Juzan, et al. v. Toulmin, 9 Ala. Rep. 662.] This course of reasoning very fully supports the purchase which was made for Mrs. Hoot's benefit, of the lot in Cahawba; the consideration on her part being the relinquishment of the right of dower in a tract of land which the husband had previously bargained and sold. The purchase of the lot cost but one hundred dollars; and the inference is reasonable that this sum did not exceed, the value of her contingent right, if that right be susceptible of estimation.

If the wife, in relinquishing her contingent interest may stipulate for an equivalent, what rule of law inhibits her from making the best bargain she can, consistently with honesty and fair dealing? Equity will not adjust with the most exact scales, (even if it were possible,) the relative value of the interest renounced, and the money or other thing given for it. The difficulty of estimating the worth of a right of dower, which may or may not attach—the uncertain, imaginary and fluctuating value of land, in this country, all considered, should induce much hesitation before any tribunal would pronounce against a transaction like the present, merely because the wife received an immediate interest of greater market value than her dower would have been, had it actually vested in possession. We repeat that she might not thus have appreciated it. The effect of fraud, in fact, would be to divest the wife even of an equivalent, the proof therefore should be most convincing to establish it.

It may be added upon this point, that it is in proof that Mrs. Hoot's mother in 1834, sent from South Carolina \$375 to \$400 in specie, which the carrier was directed not to pay to

J. Hoot, unless his wife was present to sign a receipt—it being remarked by the person who delivered it to the carrier, that it was for Mrs. Hoot, and not her husband. The carrier delivered the money to Mrs. Hoot in her husband's presence, and a receipt was signed by both of them. Several witnesses suppose that the land or a part of it sold to Shields was purchased from the United States with this money; but as they do not speak from any knowledge of their own, their testimony upon this point cannot be regarded. One witness however testifies that he received from Mrs. Hoot \$92 or \$93, and from her trustee, Campbell, an additional sum—making in all \$100, which according to her directions he invested in the entry of a half quarter section of the land which the husband sold. We do not mention these facts as establishing a resulting trust in favor of the wife or an equitable incumbrance upon the lands to which she relinquished her right to dower, to any definite extent; but they certainly present her to the court in a more favorable attitude.

In respect to the furniture and other personal property which were purchased in the name of Mrs. Hoot's trustee, there is no evidence that her husband furnished any part of the money to pay for it, or that he had the means to expend in that way, had he been so inclined. It is shown by the testimony, that he was embarrassed as early as 1838, and that since that time his visible estate has been devoted to the payment of his debts. We cannot, then, in the condition of the proof, undertake to say, that this property was paid for by J. Hoot; the proof shows that it is altogether probable the business in which his wife employed the slaves which were settled to her separate use, enabled her to make purchases to that extent.

It is shown by the testimony that the lot in Cahawba, which was purchased for Mrs. Hoot, has been improved by the erection of buildings thereon, the cost of which is variously estimated from \$1200 to 3000. The larger portion of this expenditure it is probable has been met by money received for the hire of the slaves, in which Mrs. Hoot has a separate estate, and from their employment in a boarding house and tavern under her direction. Yet it is obvious from

the proof, that her husband furnished a portion of the materials of which these buildings were erected—to what extent, the evidence does not indicate with the precision desirable. A question arises in this posture of the case, Can the creditors of the husband subject the separate estate of the wife to the extent of the property or money appropriated by the husband towards its improvement?

In *Ewing v. Cantrell*, Meigs' Rep. 364, W, the brother of Mrs. C, conveyed to her son several acres of land in the vicinity of Nashville, in trust for the separate and exclusive use of Mrs. C. during her life. The trustee was to permit his mother to have, receive and enjoy the use, occupation and possession of the premises, free from all claims, rights and demands of her husband; and upon her death the premises were to revest in the grantor, as if the conveyance had never been executed. During the same year in which the conveyance was made, the trustee with the knowledge of his mother, "but of his own accord," made improvements by building on the premises, houses designed for his mother's use, which cost \$4756 97 cents. Of this sum, \$2644 34 cents, were paid by means of the separate property of the *cestui que trust*, and \$148 21 by her husband, leaving a balance of \$2112 53 cents, which was provided by the trustee from his own funds, and was intended by him as a present to his mother.

At the time of this gift by the son he was insolvent, though the fact was unknown both to his mother and himself. A judgment being afterwards recovered against the son, and an execution issued thereon returned "no property found," the judgment creditor filed his bill, among other things to subject the separate estate of Mrs. C. to the extent of the sum her son had given in payment for its improvement.

The chancellor granted relief to the complainants, and the cause being removed to the supreme court, it was there said, that there was no pretence of a trust, secret or otherwise, between the mother and the son—nor that it was intended to hinder and delay the creditors of the son in the collection of their debts—the proof showing no ground for the imputation of intentional fraud by the parties; and there being nothing of which the relation of debtor and creditor between the mo-

ther and the son could be predicated. It was conceded that the statute of frauds made void every gift, grant or conveyance of lands, &c. "made of fraud, malice, covin, or collusion to hinder, deceive, delay," &c.; yet if money be given by an embarrassed man to his relation or friend, not upon any secret trust, to be implied from the circumstances or otherwise—but absolutely, and for the benefit of the donee; it could not be affirmed that the transaction in virtue of the statute made the latter a debtor to the donor's creditors. The court cited 1 Ves. Jr. Rep. 196; 1 Ans. Rep. 381; 1 Ball & B. Rep. 387; 9 Ves. Rep. 189; 10 Id. 368; 6 Yerg. R. 185, which it was supposed maintain that the jurisdiction of courts of chancery in cases arising under the statute is ancillary to the courts of law, and intended to give effect to the lien of creditors by judgment and execution; and unless the execution creates a lien, the assistant jurisdiction cannot be exercised. So, if the son, without any trust, secret or otherwise, gave to his mother the money in question, she would not be treated as personally the debtor of the son's creditors; and the creditors cannot treat her or her land, as being liable to them. Their judgments create no lien upon her separate estate, nor their *fi. fa.* upon the funds invested in its improvement; nor is she debtor to her son.

It was admitted that if one person expends his money in improving the real estate of another under such circumstances as to show a fraud, and that the latter was a participator in it, the owner of the estate would be chargeable with a trust. The difficulty of granting the relief sought is noticed by the court, and it is asked what shall the creditors sell to satisfy the debt? The house, or the house and the land also? If the land, because it is a small tract, would it not on the same ground be sold, if it contained as many hundred acres? And can the reversionary interest of the grantor be sold? These questions were left unanswered—the decree was reversed and the bill dismissed.

We have noticed this case thus at large, because it seems to have been well considered, and discusses principles which are cognate to those applicable to the case at bar. We cannot, however, regard it as decisive, and will consider as briefly as may be the points of difference.

The power of the wife over her separate property, it is said, depends on the intention of the donor, as it may be collected from the instrument by which the interest was created. It is said to be a rule in equity, "that a *feme covert* acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*." But this rule, it is said, does not apply to real estate limited to the separate use of a married woman and her heirs; for she is not considered as the absolute owner of such property by virtue of this limitation, as a *feme sole* would be. It must be understood only of that kind of interest belonging to the wife, which the law would give to the husband on his marriage, as personal property, and the rents and profits of her real estate during her life. [2 Ves. Sr. Rep. 190; 1 Bro. Ch. Cases, 19.] A married woman being thus capable of possessing property to her separate use, and disposing of it, a court of equity, it is said, will consider her so far distinct from her husband as to suffer her to be sued by him, or to sue him; or to be sued by, or to sue any other person with respect to that property. [Prec. Chan. 24, 275; 2 Eq. Ca. Ab. 144; see Mitf. Plead. 83; 3 Atk. Rep. 478; 3 Mad. Rep. 474; 1 Ves. Jr. R. 278; 9 Id. 486; 1 Chan. Cas. 35; 2 Ves. Sr. Rep. 452; 3 Johns. Ch. Rep. 77.]

It is said to be settled, that the separate estate of a *feme covert* cannot be made liable to general demands against her; that is where her engagement is merely implied, and not reduced to writing. In *Nantes v. Corrock*, 9 Ves. Rep. 182, it was attempted to charge the separate estate of a married woman, without any lien, but merely on the ground that it was the produce of a fraud alledged to have been committed by her upon the rights of the plaintiff; and the bill was dismissed. But in that case the property was stock, against which execution could not be given in equity, as there was no express lien upon it; and this consideration seemed to have influenced the judgment of the Lord Chancellor. It was however said by the Vice Chancellor in *Greatly v. Noble, et al.* 3 Mad. Rep. 89, "If it were necessary now to decide the point, I think it would be difficult to find either principle or authority for reaching the separate estate of a *feme covert*, as if she were a *feme sole*, without any charge

on her part, either express or to be implied." Clancy, in his treatise upon the rights of husband and wife, (p. 346,) says the present state of the law seems to be this, that if a married woman having separate property, executes a bond or note, or any other instrument by which she undertakes to pay money, that property will be bound by her engagement, though the instrument which she has signed does not purport to be a lien upon it. But if the demand against her arise merely from an implied undertaking, her separate estate cannot be charged with its payment. The learned author however admits that the law in respect to the liability of the wife's separate estate to her general engagements is so unsettled, that no clear result can be stated. [See 1 Bro. Ch. Ca. 16; 4 Id. 483; 1 Ves. Jr. Rep. 189; 4 Id. 129; 15 Id. 596.]

In *Dyett v. N. A. Coal Co.*, 20 Wend. Rep. 570, it was held, that the separate estate of a *feme covert*, in the hands of trustees, is in equity chargeable with debts contracted for the benefit of the estate. So such estate is chargeable where a portion of it has been converted into other property, in conformity to the provisions of the trust deed, and a debt is contracted for the benefit of such substituted property. See further as to the power of the wife to deal with her separate property, and even with respect to the husband himself, Clancy on Rights, &c., 347, 350, 351, 355, 612.]

In the case cited from *Meigs' Reports*, it must be observed, that Mrs. C. had but a life estate in the premises, and that after her death, they were to revert to her brother, the grantor, as if they had never been settled on her: *further*, it was supposed that the expenditure of the son's money was a gratuitous act on his part—was a gift, and did not create an indebtedness, or *secret trust* in his favor, within the meaning of the statute of frauds. That he had expended his money without the request of the mother, when she had furnished the means of making such improvements, (for any thing appearing to the contrary,) as she desired; that the *fi. fa's* in favor of the son's creditors did not give a lien upon the money thus invested by him; and as the mother was not made the son's debtor in virtue of the transaction, her estate was not chargeable to his creditors.

In the case at bar, the proof shows, that the buildings erect-

ed upon Mrs. Hoot's lot, if not projected by her, were made professedly under her supervision and control; and that her husband purchased lumber at the cost of several hundred dollars, which was used in making these improvements. Although this lumber was never paid for by the husband, yet it became his property, and while it remained in the state in which he acquired it, was subject to seizure and sale under an execution against his goods and chattels. There then can be no objection to the relief sought, so far as it respects the lumber, on the ground that it was intangible by a *fieri facias*. Mrs. Hoot could not have been ignorant that her husband furnished it—the quantity was too large to allow such a supposition, and the inquiries she must have made of her workmen, would have informed her of the materials necessary to make the improvements; so that the conclusion that Mrs. H. voluntarily accepted her husband's bounty, at least to the extent here indicated, is but natural, and under the circumstances cannot be avoided.

Here, in legal effect, was the gift of property, by a husband in embarrassed circumstances—in fact he owed the debts which the complainants in the present case are seeking to collect, at the time he exercised his bounty. According to repeated decisions of this court, a gratuitous conveyance of property by a debtor is void absolutely, as to pre-existing creditors, and if made with the intention to defraud, will be avoided as to subsequent creditors. [2 Stew. Rep. 214; 3 Porter's Rep. 196; 6 Ala. Rep. 506.] There can be no doubt but the husband could not have given the lumber to the use of his wife, so as to defeat a creditor; but as it has been converted into fixed improvements, and has become attached to the soil, it is a question of some perplexity, to determine how the value of it can be reached by creditors. If it had been officiously appropriated, we will not inquire whether it could be sequestered at a creditor's suit; but here the circumstances are such as to warrant the inference of a concurrence by the husband and wife.

In *Nantes v. Corrock*, 9 Ves. Rep. 189, Lord Eldon said, "One of the greatest difficulties that has occurred in this court is, how to give any execution against the property of a married woman; and in *Hulme v. Tenant*, Lord Thurlow

went no further than the rents and profits of her estate; not as to the estate itself; and clearly not against her person." In the present case, the interest to which the creditors of the husband are entitled, is so commingled with that of the wife, that it is impossible to separate it; and it would be unjust that the wife should be divested of her entire estate. Under such circumstances, the lot with its improvements should be leased for a term sufficiently long to extinguish the charge; unless Mrs. Hoot, or some one for her, shall within some reasonable time to be prescribed by the chancellor, pay the amount.

The sum to which the creditors are entitled, is the value of lumber furnished, with interest thereon from the commencement of the suit—and in estimating the value, reference will be had to the same period. Of course the aggregate will be divided between the complainants whose executions are unsatisfied, in proportion to the amounts respectively due to them.

It does not appear that the husband expended his money in improving his wife's estate; and we are consequently relieved from the necessity of inquiring whether such a donation could be reached by his creditors.

The proof shows that the husband occasionally expended a little labor about the improvements; but all the witnesses who speak of it, concur in the opinion, that his labor was worth but little, if any, more than what his wife furnished him to eat. But, be this as it may, we cannot very well perceive how the value of the personal labor of the husband employed in the improvement of the wife's separate real estate, can be devoted to the payment of his debts. Creditors cannot force their debtors to work, however much the dictates of honesty prompt to economy and industry; and if a man labours without compensation, his creditor cannot charge him who receives the benefit. The transaction did not make the latter a debtor to the laborer; and the creditor cannot at his mere volition make that a debt which was intended as a gratuity. It must be admitted that the labor was not susceptible of seizure under execution; and the ancillary jurisdiction of equity cannot operate upon it.

Upon a view of the entire case, we are satisfied that the chancellor erred. His decree is accordingly reversed, and the cause remanded, that it may be proceeded in according to the following instructions: Upon this case being remanded, the register will take an account of the amounts due to the complainants upon their respective executions; he will also ascertain how much lumber was furnished by Jacob Hoot, and appropriated in the improvement of his wife's lot (described in the bill,) in the town of Cahawba, and what the value of so much lumber when the *complainant's* bill was filed; upon this latter sum he will add interest from that period down to the time of making his report. Having performed the duty hereby devolved upon him, the register will make a full report thereof to the term of the court of chancery next hereafter to be holden in Dallas county. And the chancellor will thereupon render such decree as we have indicated will be proper.

The costs of *this court* will be paid by Thomas B. Sorrell and the complainants associated with him.

GILCHRIST v. BRANCH BANK AT MONTGOMERY.

1. A memorandum indorsed by the sheriff on a *fi. fa.* in these words, *case arranged in bank as per instructions*, is not equivalent to a return of satisfied, nor sufficient ground to enter satisfaction of the judgment, or to quash a subsequent execution.

Writ of Error to the Circuit Court of Montgomery.

SUPERSEDEAS sued out by Boyd upon a petition asserting that a certain execution issued at the suit of the Bank against Gilchrist and others, was irregular, inasmuch as the judgment had been fully paid and satisfied to the Bank, and that

a former execution issued thereon had been returned by the sheriff of Macon in these words: "Case arranged in Bank as per instructions. W. Fitzpatrick, sheriff." At the return of the supersedeas the plaintiffs moved the court to enter satisfaction of the judgment, and quash the last execution on the ground alledged in the petition. The motions were refused, and judgment given for the costs of the motion.

It does not appear that any evidence was submitted to sustain the motions. It is now assigned as error, that the court erred in refusing these motions.

CHILTON and McLESTER, for the plaintiffs in error, cited *Haden v. Walker*, 5 Ala. Rep. 56.

ELMORE, contra.

GOLDTHWAITE, J.—1. Wishout debating how far either of these motions could be sustained, without proof to the court, we shall proceed to consider the cause as if the alledged return was properly before us. The decision in *Haden v. Walker*, 5 Ala. Rep. 56, proceeds upon the ground that the return by the sheriff, of the execution, "settled with the plaintiff's attorney as per order of the same—costs and commissions paid to sheriff," was equivalent to the statutory return of "satisfied." We think no such inference arises out of the indorsement, which it seems was made on the execution in this case. There is no affirmation by the sheriff, that the money has been paid; and what is written seems a mere memorandum of the officer, that he had been relieved from the duty of making the money by reason of instructions from the Bank, that the execution was *arranged*—how, or when arranged there is no indication. We are satisfied it would be going too far to hold this imperfect memorandum a return equivalent to that of satisfaction.

Judgment affirmed.

CLERK OF COUNTY COURT OF LOWNDES v. ANDERSON.

1. Although the taker up of an estray, is required by law to give the clerk of the court notice of such estray, if it has been delivered to the owner, died, or escaped without his fault, within twelve months, and to account with him, for such as he still holds, yet if he fails to do so, he is not liable beyond the condition of his bond, that is, one half the appraised value of such as are not reclaimed by the owner, die, or escape. *Quere?* is not the taker up, guilty of such negligence, liable in any event for costs.

Writ of Error to the County Court of Lowndes.

Surr by the plaintiff in error, against the defendant on a stray bond.

Upon the trial, as appears from the bill of exceptions, it was in evidence, that three steers had been taken up by the defendant, as strays, about the 8th November, 1838, which were appraised to \$20 each, and that the bond in suit was taken from the defendant by a justice of the peace, and returned to the office of the clerk of the county court. It was also proved, that one of the steers had been proved away, by the owner thereof, within twelve months from the date of the appraisement, but that the remaining two were still with the defendant. It was also in proof, that defendant had never made any report, or had given information to the clerk, that the steer had been proved away by the owner.

The court charged the jury, that if one of the steers had been proven away by the owner, within twelve months from the day of the appraisement of the same, that the plaintiff could not recover for such steer, although the defendant had made no report, or given information thereof to the clerk—and further charged the jury, that if the facts in evidence were believed by them, the plaintiff was entitled to recover but one half the value of the remaining two steers, with in-

terest from the date of the forfeiture. To which the plaintiff excepted, and which he now assigns as error.

T. J. JUDGE, for plaintiff in error.

1. It is the duty of the taker up of an estray, at the expiration of twelve months, if the same is not proved away, &c. to pay one half the amount of the appraised value thereof to the clerk of the county court. If the stray is proved away, it is further contended, that it is his duty to report the fact to the clerk, else how is the clerk to know it? The clerk is bound to sue after the expiration of twelve months; and shall the clerk be thrown into the costs, on the taker up then showing for the first time, that the stray has been proved away? [Cl. Dig. 550, § 6; Id. 551, § 13.]

2. The second charge given was clearly erroneous. When a stray bond is forfeited, *the whole* of the penalty is recoverable, with interest on the same, and not one half, as the court charged. [Clay's Dig. 551, § 13; Id. 550, § 6.]

Cook, contra. The condition of the bond is, that the person posting shall pay half the appraised value. The 6th section referred to, being in force at the passage of the 13th section, cannot qualify the latter.

ORMOND, J.—By the act of 1820, the taker up of an estray, was required to pay one half the appraised value to the clerk of the county court, and upon his failing to do so within twelve months from the time of the appraisement, was subjected to an action of debt by the clerk, for the entire amount of the appraised value of such estray. [Clay's Dig. 550, § 6.]

By the act of 1823, the taker up of an estray, was required upon the value being ascertained by appraisement, to execute a bond for the amount of the appraisement, payable to the clerk and his successors in office, with condition to pay the clerk half the amount of ~~the~~ appraised value of the stray, unless the same was proved away by the owner, or owners thereof, within twelve months from the appraisement; or unless it escaped without the connivance or neglect of the taker up.

The only question to be determined is, whether the provision of the 6th section, requiring the taker up to account with the clerk, within twelve months, or be subjected to a recovery for the entire amount of the appraisement, is not still in force, notwithstanding the act of 1823, requiring a bond with condition to be executed by him.

There is doubtless much force in the argument, that such is the fact, as otherwise it would be impossible for the clerk to know when to commence a suit, but we do not see how a construction can be put upon the law, in opposition to the clear and explicit language of the condition of the bond; which declares that the obligor shall only be compelled to pay one half the appraised value of such strays as are not proven away, die, or escape. To hold that the obligor was liable beyond the condition of his bond, in virtue of a previous statute, is entirely unauthorized by the established rules for the construction of statutes. If there is, as there seems to be, a palpable incongruity between them, the former must yield.

It might be worthy of consideration, whether the defendant could exonerate himself from the payment of costs, by bringing himself within the condition of the bond, unless he had previously given the clerk notice that the stray had been proven away, died, or escaped; as the clerk, in bringing the suit, is merely performing a public duty cast on him by law.

Let the judgment be affirmed.

HOUSTON v. STANTON AND STANTON.

1. Articles of agreement were entered into, between three brothers, which recited that they had *previously agreed to be equal sharers and partners in the product of their own labor and those under their care; and to bear equally the expense of carrying on a farm, raising stock, purchasing land, negroes*

and other property, whether jointly or individually. The articles then provided for the continuance of the partnership, and extended it to all business in which either of them might engage, and stipulated that if either of the brothers died before a final adjustment and division of the property owned by them *jointly or individually*, the survivor or survivors (if one, or two of them died before such adjustment and division) should *heir* or inherit all the property, after a liquidation and final settlement of the debts or lawful claims against all or either of them: *Held*, that under this agreement, lands purchased upon *joint account*, or in the name of the brothers *individually*, inured to the benefit of the partnership; that if one of the partners purchased lands in his own name, and sold them, taking a note to himself for the purchase money, such note vested in the partnership, at least in equity, and upon the death of the payee, the surviving partners might file a bill in their own names for the enforcement of the equitable lien against the lands.

2. The lien of the vendor of land is a secret trust, and although it will be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity, connected with such advantage. If therefore a vendee who has a perfect conveyance sell the land to another person who has no notice that he has not paid the purchase money, and take from the purchaser a note for the purchase money, which is assigned for a valuable consideration by the vendee, before the sub-vendee, or the assignee has notice that the original vendor has not been paid, the equitable lien of the latter will be lost, and the assignee will be entitled to the money due on the note. And a different rule of law will not be applied, although the sub-vendee after he was informed of the non-payment by his immediate vendor, said he would not pay his note, unless he was made safe; nor will the assignee's right to retain the money be impaired because he gave to the maker of the note an indemnity to induce him to pay it.
3. The possession of a deed by the vendee is *prima facie* evidence that it was delivered to him by his vendor, and the *onus* lies upon those interested to prove the reverse to repel the presumption by proof.

Writ of Error to the Court of Chancery sitting at Livingston.

IN December, 1843, the defendants in error filed their bill, setting forth that on the 20th November, 1842, they, together with Rufus W. J. Stanton, since deceased, executed a writing under their respective hands and seals, whereby, after reciting, among other things, that they were jointly inter-

ested in a farm carried on by them, it was stipulated, if either one or two of them die before a final adjustment and division of the property then owned by the parties jointly or individually, all the property, both joint and individual, of the party thus dying, should vest in the survivor or survivors, subject to the payment of the just debts of the deceased.

Elihu Moffitt, late of the county of Sumter, contracted with R. W. J. S. for the purchase of a half quarter section of land situated in that county, and which is particularly described in the bill, for the sum of fifteen hundred dollars, payable in three equal instalments of five hundred dollars each, payable on the first day of January, 1840, '41 and '42; and delivered to the vendor his three several promissory notes, due at these periods, each for the amount of an instalment. Simultaneously with the making and delivery of these notes, the vendor executed to the vendee a bond in the penalty of three thousand dollars, conditioned to be void if the obligor conveyed to the obligee title to the land upon the payment of the purchase money.

Subsequently to his purchase, Moffitt bargained and sold to Houston, the defendant, a tract of land embracing his purchase from R. W. J. S. Previous to the consummation of the contract, he applied to R. W. J. S. to make him a deed for the half quarter section, and promised to secure the purchase money by good personal security: it was accordingly agreed, that the security should be given and the deed executed by an appointed day. Moffitt and his vendor met on that day, but the persons who were expected to become the sureties did not attend: the vendor had prepared a deed, which purported to convey the land in question to Moffitt, dated on the first day of May, 1839, but in point of fact subsequently executed; this deed was placed in the hands of Moffitt, under a promise by him, that he would in a few days secure the payment of the purchase money by new notes, in which Benjamin D. Turner and Henry G. Turner would be liable as sureties and joint makers, and until this was done, the title should not pass from the vendor. R. W. J. S. being informed a few days after by B. D. Turner, that he would not become a surety for Moffitt, shortly thereafter demanded the deed of the latter, and was informed that it

was placed in the hands of B. D. T. as a justice, with instructions to retain it until he (R. W. J. S.) was made safe and satisfied, and then to take his acknowledgment and have it recorded; if satisfactory security was not given, then he was to deliver it to him, (the grantor.)

Before the close of the year 1839, Moffitt died, and thereupon R. W. J. S. demanded of B. D. T. the deed [placed in his hands, who replied, it was placed in his hands to obtain his (the grantor's) acknowledgment, and have it recorded, but knowing that Moffitt was in doubtful circumstances, and that he had not paid the purchase money, he had not asked him to acknowledge it; afterwards Moffitt told him not to have it recorded until the grantor was secured according to their agreement. In December, 1840, B. D. T. delivered the deed to David Russell, who in a few days thereafter had it recorded, upon the probate of W. D. Robbins, the only subscribing witness.

On the 25th October, 1839, Moffitt conveyed to the defendant the lands he had undertaken to sell him—the purchase being made on a credit, and the notes of the latter being taken for the payment of the purchase money amounting to \$8,000.

Shortly after Moffitt's death, the defendant informed R. W. J. S. that unless he did something about the land he sold M. he would lose it—stating that he had applied to B. D. T. for the deed, and he refused to give it up. R. W. J. S. then directed him not to pay any part of the purchase money, until what was due him (R. W. J. S.) was discharged; to which the defendant replied, that he would not until secured. At the time this conversation took place, the defendant owed \$4,000 upon his purchase of Moffitt. Upon another occasion, the defendant gave the same assurance that he would not pay.

R. W. J. S. in his lifetime, always claimed a lien upon the land which he sold to Moffitt, and since his death the complainants have continued to make the same claim—and of the non-payment by Moffitt, the defendant had notice when he made his purchase.

Moffitt died intestate and insolvent, and consequently no

administration has been granted upon any estate he may be supposed to have left. R. W. J. S. died in 1843, and his estate has not been administered on. At the time of his death he owed no individual debts, and no adjustment or division of the property, owned individually or jointly, by himself and complainants had been made prior to that time; consequently the complainants, in virtue of the contract between R. W. J. S. and themselves, have become proprietors of the notes which the intestate held against Moffitt. Previous to the death of R. W. J. S. he filed a bill against the defendant for the enforcement of his equitable lien, which that event abated, as the complainants were not made parties.

The bill prays an account of what may be due upon the purchase made by Moffitt, of R. W. J. S., and that the land sold by the latter to the former may be subjected to the payment thereof; that Houston be made a defendant, and such other relief as may be proper to be granted.

The defendant answered, admitting his purchase of lands of Moffitt, in Oct. '39, in which were included the half quarter section against which the complainants are seeking to enforce their supposed lien; for which he paid \$4,000, and gave him two notes, payable in one and two years after date; the one for \$2,000, and the other for \$2,300. These notes, about the time they were made, were indorsed and assigned to David Russell, in his own right, or as the agent of the Massachusetts and Alabama Land Company; of which the defendant was informed previous to Moffitt's death, an event which he thinks occurred in August, 1840.

Defendant declares his ignorance of what transpired in respect to the execution and delivery of the deed by R. W. J. S. to Moffitt, its delivery to Turner, registration, &c.—affirms that he made his purchase without any notice or suspicion of the lien now set up; that it was not until after he had paid the four thousand dollars, and he thinks all but the last note, that he was informed of it. Before paying that note, he called on R. W. J. S. to learn what proceedings he should take in the matter, who then declined to interpose, assented to the payment of, and in effect instructed him to pay the last note. The defendant accordingly paid the same without any sus-

picion that an attempt would be made to enforce such a lien.

Several depositions were taken at the instance of the complainants. The articles of co-partnership between the Stantons, and the deed from Rufus W. J. Stanton to Elihu Moffitt, were proved to have been executed.

A decree was rendered in which the chancellor declares—
1. That there are sufficient parties to the suit. 2. That the equity of the bill is unquestionable. 3. That the allegations of the bill have been established by the proof. 4. That the defendant was a purchaser of the lands in question with notice of the complainants' equity, or at least received such notice previous to the payment of the purchase money by him to Moffitt's assignee. Thereupon it was referred to the register to ascertain how much of the purchase money remained due and unpaid upon the sale by Stanton to Moffitt: *Further*, if the amount thus ascertained to be unpaid, be not paid on the confirmation of the register's report, it was adjudged and decreed that the defendant be foreclosed from all right and equity in and to the half quarter section of the land in the pleadings mentioned; and that the register sell the same at public auction, after advertising the sale in the manner the law requires of sheriffs where real estate is sold under execution. It was further ordered, that the register apply the proceeds of the sale to the payment of the complainants' debt, with the interest, and costs of this suit. If there be a surplus remaining after such payment, the register was directed to pay it to the defendant. *Lastly*, that the purchaser be let into the possession, and the title to the land ordered to be sold, be vested in him.

The register reported that there was due upon the sale of Stanton to Moffitt the sum of \$2033 31; and two days having elapsed and no objection being made to the report, the same was confirmed.

J. BLISS & BALDWIN, for the plaintiffs in error, contended that the allegation that the deed from Stanton to Moffitt was delivered conditionally, is denied by the answer, and not established by proof. To show that Moffitt or his vendee held

the premises in question as a trustee for the vendor of the former, until the purchase money due him was paid, notwithstanding he had made an absolute conveyance, requires the most convincing proof.

It is shown by the bill itself, that the vendor, Stanton, did not inform Houston that any part of the purchase money due him from Moffitt was unpaid until after Houston had paid his note of \$3500—which matured in 1840; before this time, Russell states Moffitt had transferred the remaining notes which were payable in 1841 and 1842. Previous to the notice to Houston, it is not pretended that an equitable lien could have been enforced, and it is insisted that the *bona fide* assignee of Moffitt holds the notes which he acquired previous to that time, divested of the lien in the same manner that a purchaser without notice would hold the land. [1 Johns. Ch. Rep. 298; 3 Leigh's Rep. 597; 5 Stewt. & P. R. 216; 1 S. & M. Rep. 197.]

The bill should have been filed earlier, and Houston enjoined from the payment of the purchase money, at least of an amount equal to his demand. A mere notice by Stanton that he was unpaid would not have availed as a defence against Moffitt, much less would it be good against his assignee. This suit was not commenced until the last note was paid.

Again: the contract between the complainants and Moffitt's vendor, in virtue of which the former claims, was not entered into until 1842, after Houston had paid the purchase money. Under that contract, the lien did not pass to complainants, even if it existed in the vendor. [5 Ala. Rep. 363.]

It should have been shown by the complainants, if they were entitled to enforce the lien, that R. W. J. Stanton died before there was a division of the property of the partners, or an adjustment of their interests. If all other arguments fail, it is insisted that the assignee of Houston's notes should have been made a party.

E. H. SMITH, for the defendants, insisted that in all cases of the sale of land, the vendor has a lien for the payment of the purchase money, unless there are circumstances indicating

a contrary intention. [1 Stewt. & P. Rep. 237, 238.] It devolves upon the purchaser to prove that this lien has been waived or displaced; if upon this point there be a doubt, its continuance will be intended. [2 Story's Eq. 470.] The giving a note payable at a future day does not impair the lien. [Id. 474.]

A sub-purchaser without notice takes the land divested of the lien; but notice is not confined to the time when the contract was entered into, if he has notice before he receives a conveyance, or pays what he has stipulated, he will stand in the condition of his vendor. [5 Stewt. & P. Rep. 238; 2 Fonb. Eq. b. 2, ch. 6, § 2, note C; 3 P. Wms. Rep. 307; 1 Atk. Rep. 384; 2 Id. 630; 3 Id. 304.] Such second purchaser takes the estate *cum onere*, and the first vendor may proceed against him for the purchase money due by him, or enforce the lien against the land. [2 Story's Eq. 483, § 1232.]

So far as the deed acknowledges the receipt of the purchase money, it is not conclusive upon the vendor, and it will be competent to show that nothing has been paid, or that the consideration was greater or less than it recites. A receipt indorsed upon the deed is inconclusive, like all other receipts, and may be disproved by the vendor. [2 Phil. Ev. C. & H's notes, 217; 3 Id. 1441; 4 Stewt. & P. Rep. 96; 5 Id. 410; 5 Port. Rep. 505; 1 Stewt. Rep. 529; 1 Ala. Rep. N. S. 310; 2 Story's Eq. 470, 471, and note 1; 5 Ala. Rep. 363.]

No person has administered on the estate of the vendor, Stanton, or Moffitt; consequently, neither of them have a representative to make a party, if it were necessary to bring them before the court. The assignee of Moffitt is not an indispensable party, no relief is prayed against him, or Moffitt's estate, but against the land only; so that the notes made by Houston may be placed out of view, save only for the purpose of showing that they were unpaid for a larger amount than is sought to be recovered in this suit, when he had notice. [Mitf. Plead. 220; 2 Atk. Rep. 510, 551; Story's Eq. Plead. 182, 144, 160.] The complainants, as surviving partners, are entitled to sue—and perhaps as trustees for the benefit of creditors, &c. their right to come into equity without

making the creditors, &c. parties, is defensible. [Story's Eq. Plead. 145.]

COLLIER, C. J.—The agreement between the plaintiff and Rufus W. J. Stanton, contains a recital and stipulation as follows, viz: “having mutually agreed heretofore to labor in concert, and be equal sharers and partners in law and equity in the product of our labor, and those under our care; and having agreed to bear, each and severally an equal part in the expense and debts incurred by carrying on a farm, raising stock, purchasing land, negroes and other property, sometimes jointly, sometimes individually—Now know ye, and all to whom these presents shall come, that we, the said Rufus W. J. Stanton, Hubbard D. Stanton, and Warren G. Stanton, do hereby agree to still continue and carry on our farm, purchase of property, and other branch of business in which we, or either of us may engage, in joint stock, and be equally liable, and equal sharers in all profit and loss, attending or accruing from our joint or individual operations; and should either of the brothers of the parties aforesaid, die before a final adjustment and division of the property now owned by us jointly or individually, the survivor or survivors, if two should die before said adjustment and division, shall heir or inherit all the property after a liquidation and final settlement of all the debts, or lawful claims against us, or either of us,” &c.

The questions which arise upon this agreement are these, is it sufficiently comprehensive to embrace the notes which the complainants are seeking to collect and make them part of the partnership property, and are the complainants entitled to the relief they ask? The recital in the agreement is, that the parties had heretofore agreed to labor in concert, and participate equally in the product of their labor, and jointly bear the expense incurred by carrying on a farm, raising stock, purchasing land, &c. “sometimes jointly and sometimes individually.” It is then agreed, as we have seen, to continue the partnership. The testimony establishes the existence of a partnership for farming and other purposes commencing in 1833. One witness testifies that the half quarter section of land which Moffitt purchased of R. W. J. Stanton, was the property of the latter jointly, though the legal title

was in the vendor, and that their partnership contract made them alike interested in it. Independently of the written agreement, it may be, that the statute of frauds would have prevented the successful assertion of the complainants' claim; but the agreement recognizes the existence of a partnership, by which lands purchased on joint account, or in the name of the partners individually, inured to the benefit of all of them. The parol evidence is admissible for the purpose of showing when the joint operations of the complainants and their deceased partner commenced, which we have seen was six years previous to the sale by Moffitt. We therefore incline to think, that the lands in question, whether the legal title was in one or all the partners, vested beneficially in the firm. This being the case, the notes received for the payment of the purchase money; though payable to one *eo nomine*, vested in the partnership, at least in equity.

On the death of one partner, the survivors are entitled to all the *choses in action*, and other evidences of debt belonging to the firm. They must be collected in their name; and they are entitled to the exclusive custody and control of them: the books of accounts are incidents to the debts or choses in action; and whoever is entitled to the one, is of course entitled to the other. The right of action in relation to all partnership demands, is transferred to the surviving partners; but they are liable to account to the representatives of the deceased partner for his share of the partnership property. [6 Cow. Rep. 441; 1 Paige's Rep. 398; 3 Id. 526; 6 Conn. Rep. 180; 7 Mass. Rep. 257; 1 Dall. R. 65, note; 3 Rawle's Rep. 355; 4 Dev. R. 367; 1 Dev. & Bat. Eq. Rep. 524; 4 Ala. Rep. 588; 5 Id. 446; 2 Mass. Rep. 401; 6 Pick. R. 330.]

Mr. Justice Story, in his work on Partnership, (§ 346,) says, *choses in action*, debts and other rights of action of the partnership, belong to the surviving partners; and they possess the sole and exclusive right and remedy to reduce them into possession, although when so recovered, the survivors are regarded as trustees thereof for the benefit of the partnership; and the representatives of the deceased possess in equity the same right of sharing and participating in them, which the deceased partner would have possessed if he had

been living. If then the complainants have made such a case as entitles the holders of the notes to enforce an equitable lien upon the land, which was the consideration of them, the suit is well brought in their names. To the consideration of this question we will now address ourselves.

The lien of the vendor of land for the unpaid purchase money, where it has not been waived, either expressly or by implication, is a right well established in equity; but, that it may be defeated by an alienation to a *bona fide* purchaser without notice is equally clear. [Coote on Mort. 248; 3 Ala. Rep. 302; 7 Id. 318.] In *Dufphey v. Frenaye*, 5 Stew. & P. Rep. 215, it was held, where a sale of land has been made by a purchaser to a second vendee, for a valuable consideration, without notice of an incumbrance, if none of the purchase money has been paid, chancery will arrest the entire subsequent sale, and sustain the lien of the first vendor, for the purchase money. But the second purchaser will be protected to the extent of all payments made by him previous to notice of the lien or incumbrance; and if the lien is enforced against the land to any extent, it may be that he will be allowed for improvements made on it previous to the notice. To the same effect is 6 Monr. R. 198, 221.

Mr. Justice Story considers the doctrine, that a lien exists on the land for the purchase money, though well settled in equity jurisprudence, is borrowed from the text of the civil law; and is manifestly founded on a supposed conformity with the intentions of the parties, upon which the law raises an implied contract. He therefore concludes that it is not inflexible, but ceases to act, where the circumstances of the case do not justify such an adherence to it. Such a lien "is not of so high and stringent a nature as that of a judgment creditor, for the latter binds the land according to the course of the common law; whereas the former is the mere creature of a court of equity, which it moulds and fashions according to its own purposes. It is in short, a right which has no existence until it is established by the decree of the court in the particular case, and is then made subservient to all other equities between the parties, and is enforced in its own peculiar manner, and upon its own peculiar principles. It is not therefore an equitable estate in the land itself, although

sometimes that appellation is loosely applied to it." [1 Mason's Rep. 191, 212-13-14, 221-2.]

In *Bailey v. Greenleaf*, 7 Wheat. Rep. 46, it was decided that the vendor of real estate who has not taken a separate security for the purchase money, has a lien for it on the land, as against the vendee and his heirs; but this lien is defeated by an alienation to a *bona fide* purchaser without notice; and it cannot be asserted against creditors holding under a *bona fide* conveyance from the vendee. Whether it could be asserted against the assignees of a bankrupt, or other creditors coming in under the purchaser by act of law, was not determined. It was said, whether the lien of the vendor be established as "a natural equity," or from analogy to the principle, that in a bargain and sale the bargainor stands seized in trust for the bargainee, unless the money be paid; still it is a secret invisible trust, known to the vendor and vendee, and to those to whom it may be communicated. If a vendor relies upon this lien, he ought to reduce it to a mortgage, so as to give notice of it to the world, if he does not, he is in some degree accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. *Again*: "The lien of the vendor, if in the nature of a trust, is a secret trust; and although to be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity connected with each advantage."

It has been holden that a *bona fide* mortgagee of land, without notice of any equitable *lien* in the original vendor, of whom the mortgagor purchased,) is authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from the vendor,) in consideration of any just claim he may have upon the mortgagor, originating before such notice; but after notice, the lien attaches for so much as he may have actually paid or agreed to pay for such release, over and above the claims for which the mortgage was taken, and which originated before the notice. [4 Hen. & M. Rep. 113.]

In *Moore, et al. v. Holcombe, et al.* 3 Leigh's Rep. 597,

Moore purchased the land from Hancock, sold it to Franklin, executed a deed to him, received his bonds for the purchase money and assigned them to Murrell and Meem—all which occurred before Franklin had any intimation of the claim of Hancock. The assignees did not take the bonds upon any assurance of payment by Franklin; but the latter, on hearing of the claim of Hancock, determined to retain the purchase money until it should be decided whether the original vendor or the assignees had the best right to it. In this predicament of the case, the court said the question really is, between Hancock and the assignees, which shall have this portion of the purchase money, yet in the hands of Franklin. Does it belong to Hancock by virtue of his implied lien, or to the assignees, who have purchased the lands without notice of the arrears due to Hancock. The judges were all of opinion, that the assignees had the superior right to the money due on the bonds. It was said the equity as against the sub-vendee “is, that he shall pay to the original vendor whatever he himself yet owes to his own vendor. If he owes any thing, he and his land are discharged, upon his paying up the original vendor’s demand; and if he owes nothing, neither himself nor his land is in any way responsible.” It is then concluded that nothing was due from Franklin to Moore when he received notice of Hancock’s claim. Moore had previously sold his bonds “for value to persons who knew nothing of the vendor’s pretensions. From the moment of that sale, Franklin ceased to owe Moore any thing. He became the debtor of the assignees; and as he owed Moore nothing, he could be liable to Hancock for nothing.” It was admitted that assignees take every bond subject to the obligor’s equity against the obligee. Such an equity is against the bond, and intended to avoid it; the equity of the original vendor is not to discharge or vacate, but to enforce the bond for his benefit. The assignees purchased the bond subject to any equity of the obligor against the obligee, but not subject to any supposed equity of the obligee’s vendor, of which they had no notice. It was asked, why should not the lien upon the bonds given by the sub-vendee, be lost by a sale of them, without notice, in the same manner that the vendor’s lien is lost as to the *land*, by a sale to a subsequent vendee without

notice, and supposed that there was no distinction in the cases. The assignee of the bond it was said had possession of them, and a legal right to sue on them in his own name, and enforce payment; and that this was a legal advantage which equity would not take from a fair purchaser without notice. [2 Johns. Ch. Rep. 441, 479.] It was also said the assignment of the bonds transferred to Murrell & Meem the lien on the lands, which the obligee had before the assignment, and that this lien, thus acquired, was not subordinate in the hands of the assignees to that of the original vendor; and as the assignees were the parties really interested, they should be made defendants to the bill. See 4 Hen. & M. Rep. 113, upon the last point; and upon the general doctrine of equitable lien, 2 Humph. Rep. 248; 4 Wheat. Rep. 256; 2 Wash. Rep. 141; 3 Litt. Rep. 217; 4 Id. 290, 318; 5 Monr. Rep. 287, 312; 3 J. J. Marsh. Rep. 178.]

The allegation of the bill, which denies the delivery of the deed by R. W. J. Stanton to Moffitt, is not supported by the proof. B. D. Turner, a witness examined at the instance of the complainants, testifies that he was a justice of the peace, and that Moffitt delivered to him that deed for the purpose of taking the acknowledgement of its execution, that after it remained in his possession about two months, Moffitt called to inquire whether the acknowledgement had been obtained. Witness then informed Moffitt that he knew the land was not paid for, and being involved in his affairs, he felt a delicacy in calling upon the grantor to acknowledge the deed. Moffitt then instructed witness to hold the deed, until he secured the parties or settled with them. Some short time after the interview narrated, D. M. Russell called on witness for the deed—claiming it as his own, and witness delivered to him.

Witness further testified, that R. W. J. Stanton called on him to know if he could get any pay from Moffitt, and requested him to sign the notes, as Moffitt promised to give H. G. Turner and witness as sureties. Giving to this testimony all the effect that can be claimed for it, and we think it falls short of establishing that there was not an absolute delivery of the deed, or that surety for the purchase money was

a condition upon which the delivery became operative. The possession of the deed by Moffitt is *prima facie* evidence that it was delivered to him by the grantor, and the *onus* lies upon the complainants of repelling this presumption by proof—and this they have failed to do.

The defendant positively denies that he was informed of the non-payment of the purchase money by Moffitt to R. W. J. S. until some time after he had consummated his purchase from Moffitt—in fact, not until he had paid all but the two last instalments. It is proved by the testimony of D. M. Russell and J. Bliss, that at or about the date of defendant's notes, they were assigned to Russell as agent of the trustees of the Massachusetts and Alabama Land Company—that the defendant was present when the assignment was made. Russell further testifies that he never heard of the non-payment of the purchase money due upon the sale to Moffitt, until, (according to his recollection,) this suit was instituted.

Here then, simultaneously with the making of the notes of the defendant, they were assigned by the payee—neither the maker nor assignee being informed that there was an equitable lien on a part of the lands, or any thing of which it could be predicated, at the instance of the person from whom Moffitt purchased. This state of facts brings the case directly within the influence of the decision cited from *3d Leigh*, which is not only well supported by the reasoning there employed, but is fortified by the principles and illustrations furnished in the citations from *1st Mason* and *7th Wheaton*. It is unnecessary to re-state the argument here—it has been sufficiently expanded, and satisfactorily shows, that the equity of the complainants, as it existed against Moffitt, cannot be enforced against the land, nor can the defendant be chargeable upon the ground that he was informed of the claim of the complainants before he had completed the payment of the purchase money. Before he received such information, the notes were assigned to a third person who it appears from the evidence had no notice of any equity that could affect his right to receive the money on them. This we have seen gave to the assignee the paramount title, both at law and in equity, to the notes and their proceeds;

consequently left nothing due by the defendant to Moffitt to subject to the complainant's demand.

The declarations of the defendant, after he was informed of the claim set up by the complainants, that he did not intend to pay for the land, until he was made safe, cannot impair the rights of the assignee, or assist the equity of the complainants. Nor can the indemnity which the defendant received from the assignee as an inducement to complete the purchase money, have any effect upon the right of the latter to retain the money. The giving or receiving such an indemnity, neither impliedly nor expressly admitted any thing favorable to the complainants, or prejudicial to the defendant, or the assignee in a controversy with them.

Other questions have been discussed at the bar, but what we have said is decisive against the complainant's right to recover, we have therefore but to add, that the decree of the court of chancery is reversed, and the bill dismissed.

TURNER v. LAWRENCE.

1. When the parties interested in the distribution of money in the sheriff's hands appear and state an agreed case, the court may determine the right, although the sheriff has not made the application to the court, nor is a party to the case.
2. The judgment lien upon land is not impaired by mere delay, and the senior creditor who has within the year had his execution issued and returned *nulla bona* is to be preferred to a subsequent attaching creditor, if he places an execution in the sheriff's hands before a sale of the land.

Writ of Error to the Circuit Court of St. Clair.

THIS is stated in the agreed case, submitted for the decision of the circuit court, to be an application for directions, &c. as to the application of moneys in the hands of the sher-

iff. The judgment entry recites the appearance of the parties by their attorneys, and their submission to the court of an agreed state of facts, on which they prayed the judgment of the court. The facts are these: The sheriff had made money on two writs of *fi. fa.*, one in favor of Turner against Wm. B. & W. Hardwick, and the other in favor of Lawrence against the same defendants. Turner obtained his judgment on the 18th October, 1840, for \$63 07, and costs \$18 25, and on this a *fi. fa.* issued to the first term afterwards, and was returned no property. Lawrence sued an attachment against the same defendants, which was levied on the land afterwards sold, returnable to the spring term, 1843. Judgment was given in this suit the 6th March, 1844, a *fi. fa.* issued and came to the sheriff's hands 27th April, 1844, and an *alias fi. fa.* issued on Turner's judgment, which came to the sheriff's hands 1st July, 1844. The same land was levied on by both *fi. fas.* and sold under both. No other than this *alias fi. fa.* was issued after the first at the suit of Turner. The question was, to which *fi. fa.* should the sheriff apply the money? The court decided the money should be applied to that of Lawrence, first satisfying the costs of the motion.

This judgment is now assigned as error.

POPE, for the plaintiff in error, insisted—

This case is different from the case of Henderson v. Richardson, 5 A. R. 350, and Little v. McGuire, at this term, in this: here the plaintiffs in each *fi. fa.* are before the court by agreement in writing; this is "a voluntary appearance," in the language of the court in Henderson v. Richardson, *ut supra*. 2. In this case it is called an "application for directions, &c. as to applications of moneys in sheriff's hands." This application could only come from the sheriff, and will therefore be presumed to come from him; and as it appears the "parties whose interests are affected," "voluntarily appeared," "the proceeding thus assumed the form of a legal controversy." [See language of this court, in Henderson v. Richardson.] The judgment in this case is for costs out of the funds in the sheriff's hands, as well as for the application of the money. The sheriff, being always in court as an offi-

cer of the court, his assent, as far as it may be necessary, (if it is not otherwise sufficiently shown by the record that the application was at his instance,) will be presumed. In the cases cited above, the controversy in this court and in the court below was between one of the plaintiffs in execution and the sheriff.

The plaintiff's (Turner's) lien was paramount. [Morris v. Ellis, 3 A. R. 560; Campbell, use, &c. v. Spence, et al. 4 A. R. 543; Land v. Hopkins, 7 A. R. 115; Quin v. Wiswall, 7 A. R. 645.]

PECK, contra, contended the writ of error should be dismissed. [Henderson v. Richardson, 5 Ala. Rep. 350.] But if the cause is in a condition to be reversed, then he relied on Dargan v. Waring, Dec. Term, 1846.

GOLDTHWAITE, J.—1. We think this case is within the course of practice indicated in Henderson v. Richardson, 5 Ala. Rep. 350. It is there said that "when the sheriff is in doubt as to the appropriation of money collected, he should make a statement of the facts and ask the appropriate order. That this may be obligatory on all concerned, they should be duly notified, that they may come in, make themselves parties, and submit the claims to the court for decision. When this course is pursued, the proceeding assumes the form of a legal controversy," &c. It is true there is no application here by the sheriff to the court, but the practice being settled that he may cause the parties really interested to be cited to contest their respective claims, there seems no good reason why those parties may not themselves submit the same questions for decision without the formal return of the sheriff. All courts exercise the power to protect their own officers against the conflicting claims of suitors, and the mode by which this is done is of little importance, provided the parties actually interested are before the court. In England, the mode is for the sheriff to apply for leave not to make his return, and this will be allowed until one or another of the claimants indemnify him. [Watson on Sheriffs, 196.] Our practice commends itself for its simplicity, and is equally safe for the sheriff. In the present case, the parties supposed to

have the conflicting claims to the money in the sheriff's hands, submit these to the court and ask its decision. If that, when made, is binding on them, it is not material that he officer should be before the court, for he is its mere servant, and as he is responsible to either of the parties, the other being out of the way, the judgment, as it concludes the rights of both, is final of the actual litigation. It is supposed, however, this is not distinguishable from *Little & Co. v. McGuire*, at this term, which was considered as governed by *Henderson v. Richardson*, 5 Ala. 350. The difference is, that there one of the claimants was not, but the sheriff was a party to the case agreed, so that the rights of one of the parties would have been concluded without his being before the court. We think the case agreed, in the case now before us, is between proper parties, and therefore proceed to consider the question raised.

2. It is supposed the lien of the older judgment is impaired in consequence of the superior diligence of the attaching creditor, by causing his levy at a time when the other creditor had omitted to continue his execution. The general course of decision with us with regard to executions, is to continue them when there has been no fraud or culpable laches on the part of the creditor. [*Wood v. Gary*, 5 Ala. 43; *Johnson v. Williams*, 8 Ib. 529.] With regard to the lien of a *fi. fa.* on goods, it is settled a junior creditor obtains priority of them in the lapse of an entire term in the execution of the senior creditor. The lien upon lands is not derived from the execution, but the judgment in this State has that effect. [*Morris v. Ellis*, 3 Ala. Rep. 560; *Campbell v. Spence*, 4 Ib. 543.] Laying out of view any fraudulent indulgence by the creditor, we think it must be assumed the right of a senior creditor will not be lost by the mere activity of one junior in point of time. It is sufficient for the elder creditor that by the diligence required by law he has secured his lien, and when this is done, there is no sufficient reason why he should not be permitted to repose on that right until it becomes important to sell the land at the instance of another. If seems to us he must be considered sufficiently active if he asserts his rights before his judgment is dormant by delay, or after one execution returned *no property*, by

causing another to be placed in the sheriff's hands before the land is sold under junior liens. In most of the States, where judgments are liens, the preference of the older judgment continues even in the application of the money. [Hickman v. Murfree, M. & Yerger, 26; Taylor v. Thompson, 5 Pet. 358; Thompson v. Atherton, 6 Ohio, 30.]

In Davis v. Hart, 2 Bailey, 412, it was held that although the land passed by sale under an execution on a junior judgment, yet the sheriff was bound at his peril to take notice of older judgments in his own district, and was responsible to the senior creditor in an action for the money. Without undertaking to concur in this case to its full extent, it is satisfactory to show that here the right of the senior creditor is not gone, or made inferior to that of the attachment creditor by his mere delay. We are satisfied, on the facts agreed he was entitled to the money in the sheriff's hands. It has been supposed a different conclusion was arrived at in Dargan v. Waring, at this term, but there the question was between a junior creditor who had levied, and settled his right to set aside a fraudulent deed, and a senior creditor selling under a levy after the bill filed, and indeed after the settlement of the contested facts. We then considered the levy, coupled with the proceedings in chancery, as equivalent to a sale in defeating the right of the senior judgment.

The judgment of the circuit court must be reversed, and in conformity with our position, remanded.

HENDERSON AND HUDSON v. GANDY'S ADM'R.

1. An *alias* execution, issued by a justice of the peace, after the death of the defendant, is an absolute nullity, and no rights can be acquired under it.

Error to the Circuit Court of Butler.

TRESPASS *vi et armis*, by the defendant in error, against the plaintiffs in error, and one McKain, a constable, as to whom the cause was discontinued.

Upon the trial of the cause, as appears by a bill of exceptions, it was proved that the property described in the declaration was levied upon and sold by McKain, a constable, by virtue of an execution from a justice's court, by order of the defendants, upon a judgment obtained against plaintiff's intestate, in his life. That several executions had from time to time issued on the judgment, in the life-time of the intestate, and returned no property found, but the execution on which the levy was made, did not issue until after the death of plaintiff's intestate. It was proved, that the property so sold belonged to the intestate in his lifetime—that it was all he possessed—that at his death he left one child, and the plaintiff, his widow, who administered on his estate subsequent to the levy, but previous to the sale of the property.

Upon this state of facts, the court charged the jury, that if they believed them to be true, the plaintiff was entitled to recover.

The defendants moved the court to charge, that the plaintiff was not entitled to recover, if she became administratrix after the levy. Further, that an *alias* execution issued on a subsisting judgment, in a justices court, is not void, but voidable only, although issued after the death of the defendant, and that a levy might be made thereon, before administration was granted on the estate; which charges the court refused to give, and the defendant excepted as well as to the charge given. This is now assigned as error.

WATTS, for plaintiff in error. So far as respects the debtor or his representatives, the officer is justified by the process itself, in taking goods in execution. [Damon v. Bryant, 2 Pick. 411; Clark v. May, 11 Mass. 233.]

T. J. JUDGE, contra. The executions under which the

constable levied and sold, were utterly null and void, and of no more force than waste paper. [Holloway v. Johnson, 7 Ala. Rep. 660.]

ORMOND, J.—An execution issued upon a judgment, after the defendant is dead, is an absolute nullity. It is so wholly void, that a sheriff into whose hands it may come, cannot be ruled for not returning it. [Holloway v. Johnson, 7 Ala. R. 660.] An exception to this rule obtains where an execution has issued in the lifetime of the deceased, then it appears, if there has been no chasm, by the lapse of a term, but the *lien* has been regularly continued, an alias may issue after the death of the defendant in the judgment. [Collingsworth v. Horn, 4 S. & P. 237.]

This rule is confined in its operation to execution issued upon judgments of courts of record, which are a *lien* on the personal property of the defendant, from the time they come to the sheriff's hands. The executions issued on the judgment of a justice of the peace, his not being a court of record, have no such attribute, as it is expressly declared, that they "shall operate as a *lien* on the property of the defendant, from the time of the levy, and not sooner." [Clay's Dig. 209, § 42.] There being therefore nothing to connect this execution, with those previously issued, it was absolutely void, and no right whatever was acquired by the levy and sale under it.

It is not of any moment, that the administrator had not administered when the pretended levy was made under this void execution; no change was effected in the title of the property thereby, but the title vested immediately in the administratrix, upon the grant of letters of administration to her.

Let the judgment be affirmed.

JACOTT, SMITH, BRIGHT & JONES v. HOBSON.

1. A proceeding in which the right of property is to be tried as provided by statute, is a *suit* or *action*, within the meaning of the acts which authorize the dismissal of a *suit* or *action*, if security for costs is not given when required by a non-resident plaintiff; and if non-resident plaintiffs in execution fail to give such security upon a requisition duly made, it is competent for the court to dismiss the levy at their costs.

Error to the Circuit Court of Tuscaloosa.

E. W. PECK, for the plaintiff in error, insisted, that the statutes requiring a non-resident plaintiff to give security for the costs of suit, did not apply to the plaintiff in execution in a proceeding under the statute for the trial of the right of property; that such a proceeding is neither a suit at law, or in equity, but intended to render unnecessary a resort to an action. A person whose property has been seized under a *fiery facias* against the goods and chattels of another, may maintain detinue, trover, or trespass, according to circumstances; then he becomes an actor, and cannot require security for the costs, of the defendant; and if instead of pursuing this course he adopts the summary remedy provided by the statute, he cannot make such a requisition. [See Clay's Dig. 316.]

The statute requiring security for costs was passed previous to the act which provides for the trial of the right of property, and of course did not contemplate such a proceeding. It has been held that the former does not apply to a case in this court. [Minor's Rep. 328.] The case relied on by the defendant, in 5 Ala. Rep. 539, arose under the 36th rule of Chancery Practice, which differs from the statute.

W. M. MURPHY, for the defendant. The case cited from Minor's Reports, turned upon the ground that this was an appellate court, and the requisition of security was the exercise of original jurisdiction. There is no difference in principle

between the case in 5th Alabama Reports and the present. It is there determined, that such a proceeding as the one before us, is "a suit at law;" and this is quite sufficient to make the statute applicable.

COLLIER, C. J.—The several acts of 1807, provide that the defendant, in "every action at common law, or suit in chancery," may require security for costs to be given by a non-resident plaintiff, within sixty days after notice, &c. Further, that an attorney suing out process in the name of such plaintiff may be required to give the security; and if in either case, the requisition is not complied with, the suit shall be dismissed. [Clay's Dig. 316-17, § 26, 27.] By the act of 1811, it is provided, that if a plaintiff remove out of this State, after the institution of the suit, he may be required to give security pursuant to the provisions of the previous enactments. [Id. § 28.] The question is, whether these statutes, either in terms, or by an equitable construction, embrace the case of the trial of the right of property arising under the legislative acts which provide for that proceeding. These latter enactments authorize one person whose property has been levied on under an execution against another, to make oath that he has a legal title to the same; and upon entering into bond with surety, conditioned to try the right, &c. the sheriff is directed to return the execution, with the consequent proceedings, to court. Thereupon an issue is made up, under the direction of the court, to determine whether the property in question, is liable to satisfy the execution, and the *onus probandi* lies upon the plaintiff therein. [Clay's Dig. 210 to 214.]

In the case cited from Minor's Reports, by the plaintiffs in error, the motion for security for costs was overruled, upon the ground that the statutes on the subject did not apply to a cause in this court, where, except in a few cases, it was not authorized to exercise original jurisdiction; and then only with a view to the superintendence and control of inferior jurisdiction; that the requisition pertained to an original jurisdiction, and did not come within the exception. It is provided by statute, that appeals from a justice of the peace shall be tried *de novo*; and it has been decided that in such

case, "the defendant had the same right to require security for costs, as in any other suit pending in the circuit or county courts." [Thompson v. Miller, 2 Stew. Rep. 470.]

The 36th rule for the regulation of practice in chancery provides, that where a suit at law, and a bill in chancery are instituted for the same claim or demand, the court may, on suggestion of the defendant, supported by affidavit of the identity of the ground of the suits, order the plaintiff to elect in which he will proceed, and dismiss the other. In the *Planters and Merchants Bank of Mobile v. Borland*, 5 Ala. Rep. 531, a suggestion was made under this rule, that the plaintiff was the complainant in a bill in chancery, and plaintiff in execution in the trial of the right of property under the statute—both of which were for the "same claim or demand." This court said, this is not a common law action to recover the property—"but the plaintiff, by causing his execution to be levied on it, as effectually asserts that he is entitled to its value, under the claim created by his judgment, as he could have done by bringing an ordinary action at law. The claimant comes in and denies the plaintiff's right to the property to satisfy his execution—and under our statute an issue is required to be made up between the parties, which as effectually tries the title as it could be tried in an action of trover or detinue. The proceeding on the part of the plaintiff may be regarded as a statutory action, in which the leading process is the execution. In view of the trial and initiatory steps, it is concluded that the proceeding is "a suit at law," within the fair interpretation of the rule.

Both the acts of 1807 and 1811 use the terms "action," and "suit," as synonymous, and rather in a popular than in a technical sense; and this interpretation is favored by the decision cited from *second Stewart*, in which it was held, that security for costs might be required on an appeal from a justice of the peace; for such a case cannot be referred to either of the classes of actions known to the common law. The citation from *fifth Alabama* establishes, that it was not only a "suit at law," within the chancery rule, but the reasoning employed proves that it is a *suit*, within the general understanding of the term; and the plaintiff is the actor. Taking

this to be so, and there is no ground for controversy upon the question involved.

Here the plaintiffs in error were plaintiffs in execution—they were non-residents; the defendant interposed a claim to the property which had been levied on, and gave bond and surety according to the statute; the requisition for security for costs was regularly made, and not complied with. Under these circumstances, we are of opinion that the levy was rightly dismissed at the plaintiff's costs; and the judgment is therefore affirmed.

ALLEN, ET AL. V. MONTGOMERY RAIL ROAD
COMPANY, ET AL.

1. When the object of a bill is to reach equitable assets of a corporation in satisfaction of a judgment at law, and the assets are supposed to consist of the unpaid subscriptions to the capital stock, as well as the proceeds which may be produced on setting aside an alledged fraudulent deed executed by the corporation, the bill is not multifarious because individual stockholders are joined as defendants with the trustees and purchasers under the alledged fraudulent deed.
2. When stockholders in a corporation, after calls regularly made, are in default, a judgment creditor has a complete remedy at law against them, and therefore will not, for this cause only, be allowed to proceed in equity.
3. But as to such stockholders who are not in default to the corporation by reason of no call having been made, but whose subscriptions to the capital stock have not been paid, a court of equity has jurisdiction to compel payment at the instance of an execution creditor of the corporation.
4. When a corporation has provided under the terms of its charter to forfeit stock partially paid out, this dissolves the connection of the stockholders when shares are forfeited with the corporation, and a creditor cannot charge them with the amount unpaid.
5. When stock partially paid for or transferred by the stockholder *bona fide* to another person, and he is accepted by the corporation as the holder of the stock, this is a discharge of the original stockholder, and he cannot afterwards be pursued by a creditor.

6. An assignment by a rail road corporation actually insolvent, of all its estate for the security of certain bonds to be afterwards issued for the purpose of raising money to put a portion of the road in use, is not void *per se*, although it provides the estate shall be retained by the corporation until maturity of the bonds, and then sold in case of default for the benefit of the holders of the bonds, and afterwards of its creditors generally, who shall prove their demands, &c.; but the deed is imperative as a security, unless the bonds are actually issued to *bona fide* creditors before the lien of other creditors attach, or the property conveyed either by judgment or execution, as the estate is real or personal.
7. The circumstance that the corporation is actually insolvent at the time of making such a deed, and that all the estate conveyed by it is afterwards sold in a lump by the trustee, and does not produce a sum sufficient to pay the bond-holders, is not sufficient proof of fraud to avoid the deed; nor does the fact that the deed reserves the property from sale, prevent any execution creditor from selling the reversionary interest of the corporation at any time previous to the law day of the deed.
8. Although a corporation by a special provision in its charter is empowered to mortgage its effects, &c. for a particular purpose, this will not be construed as taking away or abridging its general power to execute a mortgage for the security of creditors.
9. A creditor cannot insist that a mortgage is void for the omission to register it, unless this ground is alledged in the bill—if alledged, the defendant has the right to reply notice to the creditor.
10. *Quere*—whether a sale will be set aside at the instance of a creditor interested in the sale, on the ground that the sale was at an under price, unless the creditor will offer to bid a larger sum: *Quere*, also, if a similar rule does not apply when the sale is in gross, and the assertion is, that a larger sum would be produced by a separate sale of each article.
11. The circumstance that purchasers of the effects of a corporation have surrendered them to another corporation created with the same or similar powers, does not by itself warrant the inference of an agreement before the sale thus to convey it.

Writ of Error to the Court of Chancery for the Eleventh District.

THE original bill in this case was filed the 22d May, 1841, by Wade Allen, and others, as judgment creditors of the Montgomery Rail Road Company, by judgments obtained in March, 1840, against said Company, and its several stockholders, who are sought to be charged for the amounts severally due by them on their subscriptions for stock, which it is

alleged they have not paid, and the allegation of the bill being that the company has no assets, real or personal, out of which the complainants can have satisfaction of their several judgments and executions, the latter of which, it is alleged, have been returned no property. The answer of the corporation admits the judgments, &c. as stated in the bill, and sets out, amongst other matters, that on the 7th of October, 1839, a meeting of its directors was convened for the express purpose of deliberating on the embarrassed condition of the company, and to devise ways and means to put a portion of the road in operation. The company had then expended \$450,000, and were then without the means of further prosecution. The company deemed it an imperative duty alike to itself, to its creditors and to the public, to make every lawful exertion to procure the means to relieve its pressing and immediate embarrassments, to purchase such machinery and materials, and to pay for such work and expenses as were indispensable to the finishing and opening of for use, that portion of the road extending from Montgomery to Franklin. To effect these objects, it was deemed expedient to borrow money and pledge the property of the company for its repayment. The company issued its bonds on the 20th of November, 1839, for \$50,000, accompanied with a mortgage or deed of trust, which is made an exhibit, and will be hereafter stated. The bonds were redeemable on the 1st April, 1842, in sums of \$1000 each, at 8 per cent. interest, payable semi-annually, in April and October. The deed of trust conveyed the entire assets of the company, including the road itself, to trustees upon certain trusts, which the company insists must be performed before it has any interest in the property conveyed.

All the stockholders who answer the bill assert either a full payment for the stock held by them, or that the company is indebted to them in a larger sum than is due to it for subscriptions.

In January, '45, the complainants amended their bill, and charged that the deed of trust set out in the answer of the corporation, was void in law, as made for the purpose of delaying, hindering and defrauding the creditors of the company—that no money in point of fact was ever borrowed by

the company, on the bonds issued by it, but the same were delivered by the president of the company to various persons unknown, not upon any loan of money, but either upon some other or no consideration—that the trustees named in the deed, knowing that no money had been borrowed on the bonds, advertised the property conveyed by the deed, and sold it to one B. S. Bibb for \$50,000, that sum being greatly below its true value—that Bibb purchased the same for the company, or its officers, by reason of some private understanding between them, that the purchase should inure to the benefit of the company, and that nothing was paid to the trustees. It prays that the bond holders may be made parties and required to state the consideration of the bonds, that the trustees may answer to the circumstances of the sale, and that the sale may be set aside, and the property decreed subject to the claims of the plaintiffs. The amendment also charges, that the company issued notes or bills in express violation of its charter, and that the bonds, or portions of them, were issued to take up the bills so unlawfully put in circulation. The trustees, purchaser, and some additional stockholders, are made parties by the amendment.

A supplemental bill was afterwards filed, alledging that Bibb purchased for the use and benefit of the Montgomery and West Point Rail Road Co. and making that corporation, as well as Bibb and the trustees to the deed, parties. All the defendants answer the bill, and insist on the same matters of denial or defence. The following is the account they give of the transaction. After the execution of the deed of trust, the president of the company, by its direction, sold six of the bonds to C. P. Shannon—one to E. Ross Riddle—and one to Henry Nagle, in payment of debts due and owing to them as engineers of the company—ten to W. B. S. Gilmer—one to E. Holt—four to Wm. Taylor—three to Abner McGehee—and two to T. M. Cowles, for which the president received \$20,000, in cash, which he subsequently applied under direction of the corporation, in putting the road in operation between Montgomery and Franklin. The company had contracted a debt with Rogers, Ketchum and Grosvenor, of about \$14,000, and appropriated fourteen of the bonds for the purpose of paying them—but on their refusal to take the

bonds, they were sold as follows: six to Abner McGehee—two to N. E. Benson—two to C. T. Pollard—two to B. S. Bibb—and two to Jesse P. Taylor, for three notes, which were transferred to R. K. & G. in full payment. These notes were afterwards paid in cash. Four of the bonds were transferred to Henry Burden in payment of a debt due for spikes, and the three remaining to James Brooks, in part payment of a locomotive. In addition to this statement of the consideration, the denial is express, that none of the bonds were paid out for notes issued by the corporation. On the the 1st of April, 1842, the bonds remaining unpaid, the trustees were required by the holders to proceed and sell the property conveyed by the deed, and in accordance therewith, after giving the preliminary notice, did sell the entire property at public auction, in July, 1842. The whole of the property was offered together, for specie—but one bid was made, and it was knocked down to Bibb, as the purchaser. No money was paid at the sale, or afterwards, but the whole number of bonds was produced to the trustees, and each one credited with \$1,000. Bibb, in this purchase, acted for himself, C. T. Pollard, T. M. Cowles, N. E. Benson, J. E. Scott, Henry Burden, Wm. Taylor, J. P. Taylor, Lewis Owen, W. B. S. Gilmer, A. McGehee, and Charles B. Shannon, who were then the owners and holders of forty-five of the fifty bonds issued. All of these persons, either in person or by proxy, attended the sale, and afterwards became the owners of the other five bonds. Having made various arrangements and sales between themselves, the entire number of bonds became the property of Bibb, Pollard, Owen, McGehee, Wm. Taylor, Scott, Cowles and Shannon, and the deed of the trustees was executed, conveying all the trust property to them. The purchase was made exclusively for their own benefit, and without any understanding that it should inure to the benefit of the company, or of the Montgomery and West Point Rail Road Company, which was not then in existence. The deed of trust exhibited, recites the resolution of the corporation of the 7th of October, 1839, to borrow \$50,000, and to cause their bonds to be issued, and that in pursuance thereof, fifty bonds for \$1,000 each were issued in

a particular form. It then proceeds to convey to John Whiting, James H. Taylor, and Charles Crommelin, a number of tracts of land in the several counties on the line of the road, between the county of Montgomery and the State of Georgia, as well as in the State of Georgia; together with the machinery, depots, warehouses, works, engines, cars, received and to be received, and all real and personal property of whatsoever kind or nature, in any manner belonging to the company. The trusts declared by the deed are as follows:

1. To receive and hold the premises conveyed for the special purpose of securing and providing for the payment of the said bonds, and to effect this, the trustees are empowered, if the bonds are unpaid on the 1st of April, '42, to sell the premises conveyed at public auction, for cash, after a notice of ninety days, or so much thereof as should be sufficient to pay the bonds outstanding.

2. In the event of sale, after paying the bonds, or retaining a sum sufficient to pay them, then to pay all creditors of the company *pari passu*, and without preference, who should present their claims properly authenticated, after sixty days public notice.

3. In case there should be a residue, then to pay the same over to the president and directors of the company.

But all these were subject to the further trust, that the company should remain in the possession of the premises, and take the profits thereof, and apply the same towards the completion of the said road, until default in paying the bonds due on the 1st April, '42.

One of the stockholders, B. D. Harris, admits that he subscribed for ten shares, amounting to \$1000, and had paid but \$500.

All the defendants who answer demur to the bill, but the demurrers are either general or assign for cause, that no case for relief, as prayed, is made by the bill. The evidence taken in the cause, does not materially change the features made by the bill and answers—that of the defendant however, shows the transfer or sale of the bonds, by which the claim of Rogers, Ketchum & Grosvenor was discharged, was on the 10th December, 1839, as the notes of the purchasers

bear that date. The other transfers were probably made earlier—though the time is not stated by the witnesses.

No evidence was taken in reference to the actual value of the property sold by the trustees, or as to whether it would have produced more if sold in distinct lots.

The chancellor dismissed the bills at the hearing, on the ground that the amendment made a new case, inconsistent with the original bill—that the complainants could not proceed in the same bill to charge the individual stockholders and the assets of the corporation—and that this defect was reached by the general demurrer.

T. WILLIAMS, J. A. ELMORE, and HEYDENFELDT, for the plaintiff in error, made the following points:

1. A creditor's bill may be so framed as to embrace two classes of cases—1, in aid of the execution at law to set aside an incumbrance, or a fraudulent transfer—2, to have his judgment paid out of choses in action or other equitable assets of his debtor. [Williams v. Hubbard, Walker's Ch. R. 28; Wilcox v. Cary, 9 Dana, 298; Halbert v. Grant, 4 Mon. 583; Brinkerhoff v. Brown, 6 John. Ch. 139; Cummings v. McCullough, 5 Ala. Rep. 339; Story's Eq. P. 120, 233, 409 to 413.]

2. But if the amendment made the bill multifarious, it could be reached only by a special demurrer. [Story's Eq. Pl. § 458; 30th Rule of Prac. Dig. 616.] If the demurrer reached the defect, the party has the right to amend and elect on which point he will proceed. [Marriott v. Givens, 8 Ala. R. 710.]

3. The deed is void on its face—

I. Because by the charter of the corporation it could only exclude a deed creating a lien for money actually borrowed. [Acts '34, p. 121, § 10.]

II. In requiring the postponed creditors to present their claims properly authenticated, on sixty days notice, but without fixing any time when the presentation shall commence or end; also, because the manner of authentication is not defined. [Gazzam v. Pontz, 4 Ala. Rep. 374; Ashurst v. Martin, 9 Porter, 574; Hyslop v. Clark, 14 John. 458; Wakeman v. Grover, 4 Paige, 23.]

III. Because complainants were existing creditors, known to the grantors, and trustees, and whose claims the deed has the tendency to delay. [Pope v. Wilson, 7 Ala. R. 695.]

IV. The residue, after paying the bonds, is reserved to the grantors, without providing property for the payment of the complainant's demands.

V. The deed secures a preference to subsequent creditors, who may advance the corporation, money—the corporation being then insolvent, and debtors of the complainants. [Barham v. Hempstead, 7 Paige, 568.]

VI. The deed is invalid without the consent of the creditors, for whose benefit it was made, as all creditors by its terms are delayed until the 1st April, '42. Kemp v. Porter, 7 Ala. Rep. 138; Elmes v. Sutherland, Ib. 262; Hodge v. Wyatt, 10 Ala. Rep. 271.

VII. The deed was made in contemplation of immediate insolvency, and provides a trust for the grantors for two and a half years.

VIII. The deed was not recorded at the different places where the land is situate, or within the time required by law.

4. If the deed is not void on its face, the surrounding and attending circumstances show it was a contrivance to keep creditors at bay until the road could be finished, and the object was to place the corporation in a condition to work out its debts. If one will advance his money on a security calculated to produce such results, it is a fraud on the other creditors. [Cummings v. McCullough, 5 Ala. Rep. 335; Wiswall v. Ticknor, 6 Ib. 184.]

5. The mode of selling is another indication of fraud, or secret reservation of trust. [Nesbit v. Dallam, 7 G. & J. 494; Griff v. Jones, 6 Wend. 522.] And in fact the road is now owned by the same corporation under another name. [Acts of '46, p. 18.]

6. The capital stock of a corporation is a pledge for the payment of debts. [An. & A. on Cor. 475; Wood v. Damon, 2 Mason, 308; 5 No. Law Mag. 282; State v. Reeves, 5 Iredell, 297.]

7. The subscriptions of stockholders is liable, the same as the capital stock. [4 No. Law Mag. 106; Ward v. Gris-

would do. January, '46; Selma R. R. Co. v. Tipton, 5 Ala. R. 757; Beene v. Cahawba R. R. Co. 3 Ib. 660.]

8. Members cannot withdraw, and thus evade their liability. [Selma R. R. Co. v. Tipton, 5 Ala. R. 757.]

J. E. BELSER and J. W. PRYOR, for the defendants in error, insisted—

1. The facts set out in the amended and supplemental bills are immaterial in connection with the original bill, and made the proceedings considered as a whole, multifarious. [Story's Eq. Pl. 17, 593; Birch v. Scott, Bland. 121; Chapman v. Chim, 5 Ala. R. 402.]

2. The cause is in such a condition, that no decree can be pronounced on the general equities—therefore the demurrer should have been sustained, for though general, it opens the equity of the bill. [Crawford v. Childers, 1 Ala. R. 482.] The cases cited by the complainant do not come up to this, as in all of them the defendants were connected with the transaction by fraudulent acts.

3. If however, the cause should be retained and a decree made on its merits, it is insisted the individual corporators are not chargeable with the debts of the corporation. [1 Black. Comm. 517; 1 Fonbl. Eq. 306; 1 Lev. 237; 2 Verm. 396.]

4. It is not enough to confer equity jurisdiction, that no property can be found. There must be some ground for equitable interference, such as trust, fraud, &c. [Williams v. Hubbard, Walker, 29; Donovan v. Finn, Hop. 59; U. S. v. Myers, 2 Brock. 516.] The stock is the property of the corporation, and property is not a trust fund for creditors. [Catlin v. Eagle Bank, 6 Conn. 233; Pope v. Brandon, 2 Stew. 401]

5. If however, the property can be reached by creditors, on the notion of a trust, the bill should have averred there were no other creditors unpaid, and should have been filed for the benefit of creditors in general. [Ward v. G. Comp'y, 16 Conn. 594; 1 Bland. 84; 2 John. Ch. 306.]

6. It may be important to consider whether the rail road itself could be reached by execution. The road is in law a franchise which cannot be seized or sold; all that can be sub-

Allen, et al. v. Montgomery R. R. Co. et al.

jected is the profits over what is necessary to keep the road in repair. [13 S. & R. 210; 4 Mass. 596; 2 Bac. Ab. Execution, C; Rives v. The State, 5 Iredell, 297.] In Pennsylvania they have the same statute making lands subject; yet the case cited shows a rail road cannot be sold under this general term. In North Carolina, where the decision was otherwise, it turned on a statute making the property of the corporation subject to *fi, fa*. [10 Am. Law Mag. 282; State v. Rives, 5 Iredell, 297.] The fact that the corporation sold the road, and that the legislature invested another company with the purchase, does not give the complainants any rights. The grant must be considered as a new grant. [See act of 1843.]

7. Although one section of the charter gives the power to the company to pledge its property for a loan, it cannot be considered as taking away the general power, or it may be considered as creating the power to pledge the franchise. [A. & A. on Corp. 126; Reynolds v. Com'rs, 5 Ohio, 205; Jackson v. Brown, 5 Wend. 590.]

8. A corporation has the same right as an individual to prefer one creditor to another, and the fact of insolvency will not avoid the deed. [Bank v. Bates, 6 G. & J. 315; Catlin v. Bank, 6 Conn. 233; Bank v. Bates, 8 Conn. 505; Conway, et al. v. — 5 Ark. 302; Pope v. Brandon, 2 Stew. 401.]

9. This deed does not show the corporation was in failing circumstances, or that it contemplated insolvency at that or any other time. On the contrary, the object was to raise funds to finish the road for a certain distance, and thus make it productive, without which no creditor could expect to be paid.

10. The deed in this case was not intended to secure future liabilities, as the action of the board contemplated an immediate loan of money, but if it was so intended, this is no matter to avoid the deed. [Hendricks v. Roberson, 2 John. Ch. 306; U. States v. Hooe, 3 Cranch, 73; Barnum v. Hempstead, 7 Paige, 568; Halsey v. Whitney, 4 Mason, 206; Johnson v. Cunningham, 1 Ala. Rep. 249; Stover v. Herrington, 7 Ib. 142; Carloss v. Ansley, June Term, 1846.]

11. Nor does the stipulation that the mortgagors shall remain in possession avoid the deed. [Brindley v. Spring, 7

Greenl. 241; Bassiter v. Wheeler, 9 Pick. 21; Foster v. Parker, 12 Ib. 451; Cunningham v. Freeborn, 11 Wend. 240; Vernon v. Martin, 8 Dana, 251; Tompkins v. Wheeler, 16 Peters, 119; Bank v. Clark, 7 Ala. Rep. 768; 6 Ala. 189; 7 Ala. Rep. 879.]

12. If it was necessary for this deed to be recorded within any precise period, the mere fact that it contains personal estate will not avoid it as to the realty. [Prince v. Roper, 9 Pick. 176; Anderson v. Hooks, Jan. Term, '46.] The question of recording, however, is not raised in the bill; if it had been, the fact of notice might have been in issue. [Clements v. Kellogg, 1 Ala. Rep. 330.]

GOLDTHWAITE, J.—1. When the objection of multifariousness is well taken to a bill, it is probably the correct practice to allow the party to amend, or elect on which ground of equity he will proceed. [Marriott v. Givens, 8 Ala. Rep. 694.] If it is so, however, it does not follow that a decree of dismissal will be reversed because the election is not tendered by the court, instead of being asked by the party. Neither does it seem to be a necessary consequence of the right which defendants have, to object specially on account of multifariousness. [Welborn v. Tiller, 10 Ala. Rep. 305.] That the court is prevented from refusing of its own mere motion to entertain jurisdiction of a suit which is thus complicated, see Greenwood v. Churchill, 1 M. & K. 546.] We do not intend, however, now to discuss any of these questions, as in our judgment the bill in the present case is not multifarious. The object of the bill is to reach the equitable assets of the corporation in satisfaction of the complainants' judgments at law. These assets, it seems, are supposed to be of two sorts—1. Those arising from the right of the corporation to call in its unpaid stock; and 2. Those which may be produced by setting aside the alledged illegal conveyance. Now it is true, the stockholders, as individuals, have no concern with the allegations of fraud which affect the deed; but, supposing the unpaid subscriptions and the property conveyed to be assets of the company, the creditor has the right to pursue them as such, and is entitled to the aid of a court of equity to remove the obstructions which

prevent him from doing so. In *Brinkerhoff v. Brown*, 6 John. Ch. 139, the object of the bill, as it is here, was to set aside conveyances as well as to compel payment from defaulting stockholders. It is true, the chancellor seems to rest his decision against the demurrer on the ground that all the defendants are charged with fraudulent practices, though in different degrees; but we do not think this is the foundation on which the right to join defendants rests. If it was, and the fraud was disproved at the hearing, there would be difficulty in saying the entire suit should not be dismissed. Again, if the right rested on such a charge, the complainant might always avoid the objection by making that sufficiently broad. It is said by Judge Story, after a careful review of all the adjudications, that the principles to be deduced from them seem to be, that when there is *a common liability in the defendants and a common interest in the plaintiffs*, different claims to property, at least if the subjects are such as can without inconvenience be joined, may be united in one and the same suit. [Eq. Plead. 409, § 533.] Lord Redesdale had previously said that when one general right is claimed against all the defendants, the court proceeds on the ground of preventing multiplicity of suits; and that if there are but few reported cases on the subject, it is because the practice is perfectly understood; and in bills by vicars, &c. claiming tithes against several defendants whose cases may be all distinct and their decrees different, the practice in England is constant. [Whally v. Dawson, 2 S. & Lef: 367.] The case of the Mayor of York v. Pilkington, 1 Atk. 282, is of this description; and there a bill was sustained to quiet the plaintiff's right to a fishery against several defendants having no privity between themselves. It will be seen the principle of this decision is quite different from that stated in *Brinkerhoff v. Brown*, and afterwards recognized in *Fellows v. Fellows*, 4 Cowen, 632, and extends the rule sufficiently far to cover this case. In creditors' bills, it seems in New York to be the common course to make the debtors of the defendant parties. [Stafford v. Mott, 3 Paige, 100.] Indeed, when we consider the correlative rule, that all judgment creditors may join as complainants, on the ground that there is a common right against the same defendants, it seems entirely reasonable that

any creditor should have the right against as many defendants as may be necessary to give a full remedy, when all of these defendants are alike chargeable to him. The analogy which there is between this case and a creditor's bill, in which the debtors of a judgment debtor are proper parties must be apparent to every one, although it is possible such debtors would not be proper parties to a similar bill in our own courts, unless on account of some additional equity, for the reason that our statutes allow such to be garnisheed by process from the courts of law. Whether there are such additional equities here against the stockholders we shall presently consider, but what has already been said is sufficient to indicate our opinion that the bill should not have been dismissed on the grounds assumed by the chancellor.

2. We come now to consider what is the equity of the bill as against each class of the defendants. As to those stockholders who were in default in paying their subscriptions after the calls of the corporation, (if indeed the bill shows there were any such) it is certain these could be reached by the ordinary course of law as debtors to the corporation. [7 Ala. Rep. 51; 5 Ib. 403; Ib. 787.] And therefore as against such, it may be considered the bill will not lie, as no additional equitable circumstances are stated to give jurisdiction to the court.

3. As to stockholders on whom no calls had been made under the charter, (which we understand is the case intended to be presented by the bill) a different rule obtains. If the act of 1841 (Dig. 261, § 10) is to be construed as allowing garnishee process when the corporation itself has made no calls, it does not cover this case, for the bill was exhibited before that act was passed; and it is certain they were not liable to that process under the previous legislation, for the indebtedness was incomplete until a call was made pursuant to the charter. *See cases last cited.* Has then a court of equity the authority to reach subscriptions for stock to satisfy a creditor when there is a deficiency of legal assets, in the absence of any call by the corporation upon its stockholders? That it has, is, we think, a clear position, as well on principle as authority. As the individual corporators are not them-

selves personally responsible for the contracts of the corporation, there is no responsibility any where, if the capital stock is not a fund answerable to the creditors, and it would seem to make no difference in the right, whether this capital stock or fund existed in property or equitable assets. Nor can it vary the right if the legislature, instead of requiring the stock to be paid in, has permitted the corporation to call for it as their necessities, or the convenience of stockholders may require. In the latter case, the subscription is a debt which the corporation may call for, and if debts are contracted beyond the assets in hand, it would be most inequitable to neglect or refuse to make the call so as to discharge the debt. It is on this obvious principle that a court of equity assumes jurisdiction and compels the corporation and stockholder to do that which justice requires—that is, to discharge the debt to the extent that the capital stock remains in the hands of the stockholder. In *Wood v. Dummer*, 3 Mason, 308, individual stockholders were held liable where the capital of the corporation had been paid out to them even after its insolvency and dissolution. The equity of the creditor, as it seems to us, is equally strong where the stockholder has contracted to pay, but has never paid his portion of the capital stock. Hence, we conclude the creditor has the right to pursue a stockholder when there is a sufficiency of legal assets, although the corporation has made no calls.

4. It becomes necessary to ascertain further, whether the creditor has any rights against such stockholders as the company proceeded against, to forfeit their shares for non-payment of instalments, or against such as transferred their shares previous to the exhibition of the bill. •We consider these positions together, because, ordinarily, they seem to be governed by the same general principles, where there is no special provision in the act of incorporation. In general, the subscription by the stockholder makes him a contractor with the corporation upon the terms prescribed by the act creating it, (3 Ala. Rep. 660; 5 Ib. 787); and it seems a necessary consequence that, where the rights of others are not affected, the contract may be modified or discharged by mutual consent. In the present instance, the act of incorporation expressly gives the corporation the power to forfeit the stock of

delinquent subscribers, and although this is a privilege conferred on the corporation, and which they may waive if they will, and resort to their other remedies to call in the stock subscribed for, (5 Ala. Rep. 787), yet we think it admits of no reasonable doubt when the election is made *bona fide* and the forfeiture insisted on, that there is an end of the contract.

5. The charter is silent as to the time and the mode and manner in which the stock may be transferred, yet we apprehend a stockholder at any time after subscription, could invest another with his rights in the company. That he can discharge himself from liability, either to the company or elsewhere by his own act, is by no means clear, and we incline strongly to the opinion, that it could not be done without the consent of the corporation. If, however, the corporation consents to discharge him from the contract and receive his transferee as a stockholder in his stead; we can perceive no valid objection to their doing so. Indeed, the whole matter seems to rest on the same principles as any other contract, where a different rule is not prescribed by or necessarily grows out of the charter. It can scarcely be supposed that equity would allow a debtor to voluntarily discharge his debtor to the prejudice of creditors; and it has been held a stockholder cannot avoid responsibility by a transfer to an insolvent person. [Marcy v. Clark, 17 Mass. 330.] It has also been held, that a fraudulent subscription in the name of minors would not avail the actual subscriber against the claims of a creditor. [Roman v. Fry, 5 J. J. M. 634.] If these positions are true, and we are satisfied they are so, it warrants the conclusion that a *bona fide* transfer, accepted and recognized by the corporation, will have the effect to discharge the original subscriber from future liability to the corporation or its creditors. The *bona fides* of the transfers asserted by the answers do not seem to be controverted by the complainants, and as they were made and accepted by the corporation previous to the exhibition of the complainants' bill, in our judgment the latter have no claim against them.

6. Having ascertained the equities of the complainants against the stockholders of the corporation, we shall direct our attention to the trust deed. If this was an assignment

for the benefit of creditors, it would scarcely admit of question that the preference given to the bonds would render the deed void, as creating a trust subject to the future nomination and appointment of the corporation. [Barnum v. Hampstead, 7 Paige, 568.] Such, however, is not the character of this deed, nor was that effect contemplated or intended, unless the bonds were actually disposed of and were not paid at maturity. The corporation do not stipulate that its creditors generally or specially shall have any rights whatever under this deed, if the bonds remain in the hands of the company.

If a sale of the property conveyed, was necessary to meet the bonds, it was probably considered by the corporation as equivalent to a dissolution, and therefore the provision became necessary and proper, that the trustees should distribute the surplus *pro rata*, to all the creditors. In point of law, the trust deed was entirely inoperative until the bonds were actually issued, as until then, there was no debt to be secured, and if the right of any of the complainants to seize the estate of the corporation was complete by judgment and execution, before the bonds came to the possession of a *bona fide* holder, the deed of trust would not operate against this right. In our judgment, the validity of a conveyance of this description, rests on precisely the same principles as obtain when deeds are made which provide for the security of future advances, or for future liabilities. In the case of the United States v. Hooe, 3 Cranch, 75, it is said with respect to the latter kind, to be frequent for a person who expects to become more indebted, to mortgage property to his creditor as a security for debts to be contracted, as well as for those which are already due, and that although such a deed may be used for improper purposes, yet such a provision is not positively inadmissible. The same doctrine is sustained by a numerous array of authorities in Barnum v. Robinson, 2 Johns. Ch. 283. It is obvious in every deed of this nature, that if the mortgagee, or *cestui que trust* could avail himself of its provisions, after another creditor had armed himself with a judgment or execution, it would be exceedingly dangerous, and courts would probably limit its effects to such debts or liabilities as were in existence at the time of the creation of the judgment or execution lien; but when the

debt or liability is created at a time when the grantor is not incapacitated from making a new conveyance as a security, no such danger can be apprehended. At such a time he could give a new security, and there is no reason why he should not provide, that one already given shall have the same effect. It is also obvious, when a deed is executed as a security for a future debt, that it is inoperative as a conveyance until the debt is created, and is indeed only a conveyance to uses to be subsequently declared by the grantor. The time when these bonds came to the hands of *bona fide* holders, is not set out distinctly in the answers, though we think the fair inference is, the defendants are to be understood as asserting they were issued before the complainant's obtained their judgments. The proof is also indistinct, except as to such of them as were sold to meet the indebtedness to Rogers, Ketchum & Grosvenor, which was the 10th December, '39, but the inference is strong, that those sold for cash, were sold previous to that time. This inference becomes much stronger, from the circumstance that a witness was examined, who, from his connection with the company, must have known when the bonds were sold, but whom the complainants did not require to explain the doubtful matter. We think then, the defendants have sufficiently made out, that this deed was executed as a security for the bonds, and that these were in the hands of *bona fide* holders, at least to a sufficient amount to sustain the deed, previous to any lien acquired by the complainants. In this aspect the deed stands as a security, given to secure debts payable at a future day, and although the possession of the grantor is stipulated for until that day, this circumstance has no tendency to hinder or delay creditors, as they could at any time after their judgments have compelled the trustees to close the trusts within the principles stated in *Dubose v. Dubose*, 7 Ala. Rep. 235, and *Pope v. Wilson*, Ib. 690. In our judgment, the deed on its face is valid, and operative when connected with the fact, that the bonds, or any of them, were held *bona fide* previous to the time when the complainants obtained judgment.

7. It is as well here as elsewhere, to express our opinion, that the circumstances of the case do not create the presumption of fraud in fact. It may be, and doubtless is true, the cor-

poration was unable to meet its engagements—that it was in point of fact insolvent—but this did not take away its capacity to prefer either its old creditors or to give a valid security to new ones. It appears the effort was to get a portion of the road in working order, and *prima facie* expenditures for this purpose could have no bad effect on the rights of existing creditors. It appears also, that the entire sum received for the bonds was appropriated to the completion of the road, and that those which were issued on other contracts, were in payment for machinery, or to engineers, for a similar purpose. We are not warranted in declaring, either that the corporation, or its new creditors, acted with bad faith, or that the intention existed in either, to hinder or delay other creditors. The previous decisions of this court last referred to, are conclusive to show, that the deed itself was no impediment in the way of other creditors seeking to close the trust, and that the courts would have enforced their rights to the residuum, which was all they were entitled to.

8. The two last conclusions dispose of many of the positions assumed by the complainants, but there yet remain others which require an answer. It is urged, the directors have no power by the charter to mortgage or charge the property of the company, except for money borrowed, and consequently that the present sale will be set aside because bonds were issued for debts created in a different way. It is true, that by a special section of the charter, the president and directors are empowered “to borrow money to carry into effect the objects of the charter, to issue certificates or other evidence of such loans, and to pledge the *property* of the company for the payment of such loans.” We do not think it important to inquire whether this section authorizes a pledge of the franchise, in common with the other property of the company, because, if it does not, there is nothing to induce the supposition that the legislature intended to take away the general power of the corporation to create liens for any other purpose. In our judgment, the general powers of the corporation extended to the creation of a lien on all its property, without reference to the mode of creating the debt, and it is not unlikely the section referred to was intended to confer the power to hypothecate the franchise also.

9. Another point in the case is, that the mortgage is void because it was not recorded in proper time. If the object was, to set aside the deed on this ground, we think it should have been set out in the bill, in order that the defendants might reply the fact of notice, as it only is to creditors without notice that the statute avoids an unrecorded deed of trust. [Dig. 256, § 5.]

10. The allegation that the sale was made for an inadequate price, does not seem sustained by the testimony, but if it was, a grave question would arise, whether any court would feel authorized to act on such grounds, when the parties complaining of it do not come at the earliest period, and even then, whether the biddings will be opened without the offer to bid a greater sum. The same remarks, in a great degree, apply to the objection that the sale was in gross. There is no evidence of fraud in the sale, or that the property would have commanded a greater sum if sold in separate lots.

11. We shall purposely omit to consider the act incorporating the Montgomery and West Point Rail Road Company or rather changing to that the name of the former corporation, because the facts involved in this case seem to have no connection with that act. The circumstance that the purchasers under the trust deed have thought proper to surrender their purchase to the new or changed corporation is not a fact charged in the bill, nor does it by itself make out the charge that the property was purchased for that or for the old corporation.

The conclusion affecting this cause, to be drawn from the principles thus ascertained, is, that the bills were improperly dismissed on the ground of multifariousness—that at the hearing, the original bill should have been retained, and an account taken of what was due from the stockholders, in conformity with the rules now declared, and that the amended and supplemental bills, so far as these seek to charge the trustees, the purchasers under them, and the Montgomery and West Point Rail Road Company, should be dismissed.

Decree reversed and remanded, for proceedings in conformity with this opinion.

RODGERS v. RUSSELL.

1. A bank note being passed off upon an agreement to take it back if not current, the person receiving it may recover, if it was uncurrent, although he had passed it off, had been sued for passing it as a current note, and had recovered a judgment; after which, and whilst the judgment was still in force in his favor, he took back the note, and brought suit against the person passing it to him.

Writ of Error to the Circuit Court of Tallapoosa.

THIS proceeding was commenced before a justice of the peace by the defendant in error, when he obtained judgment, and the cause was carried by appeal to the county court, and afterwards transferred to the circuit court.

Upon the trial, it appeared in evidence, that the plaintiff had received from the defendant a \$20 bank bill, in part change of a hundred dollar note, and that the defendant represented it to be current, and promised to take it back, if it was not, and give other current money for it; and evidence was also offered tending to show it was not current in the neighborhood where the parties lived.

It was also in evidence, that the plaintiff passed off the bill to one Gray, and refusing to take the bill back from Gray, he sued the plaintiff before a justice, in which suit the plaintiff cast Gray, and obtained a judgment against him, which judgment is still in force and unreversed. Afterwards the plaintiff took the bill back from Gray. This is the same bill on account of which this action is brought.

The defendant's counsel moved the court to charge, that if the plaintiff had recovered judgment against Gray, as before stated, and that judgment was still in force, they must find for the defendant, which charge the court refused, and the defendant excepted, and now assigns that matter as error.

W. P. CHILTON and FALCONER, for plaintiff in error.

MORRIS, contra.

ORMOND, J.—It is very certain that the fact that Russell passed off the note to Gray, did not exonerate Rodgers from the performance of his contract, if the note was in fact not current, and returned again upon Russell. How is the case altered by the litigation between him and Gray, to which Rodgers was neither party or privy. If in that suit Gray had cast Russell, assuredly that judgment would have been no evidence against Rodgers, that the bill was not current; and for the same reason, it is not evidence for him. The case of *Lea & Hopkins*, 6 Wheat. 109, merely affirms the well known principle, that a judgment or decree, upon the same matter, between the same parties, cannot again be brought in litigation.

It is however urged, that the taking back of the bill by Russell, from Gray, after he had obtained a judgment, affirming that the note was current, was a purchase of it from Gray, as the judgment, whilst it remained in force, was a satisfaction. There would be some force in this objection, if it were clear that the judgment in favor of Russell, was irreversible. It may be that he became satisfied, it was erroneous, and the result of this case would seem to indicate, that it was, and that he did not wish to risk the costs of further litigation with Gray. In that aspect, he certainly had the right to abandon the judgment he had obtained, and take back the note, and call on Rodgers to perform his contract, by giving him current money for it. We cannot therefore assume from the fact that he obtained a judgment against Gray, that he was exonerated from liability, so as to raise the presumption that he had abandoned the contract with Rodgers, and made a new contract with Gray.

Let the judgment be affirmed.

TRAYLOR v. MARSHALL.

1. Although an administrator cannot sell the estate of his intestate at private sale, and without an order of the orphans' court, yet if one thus sells without authority, and the property is delivered to the purchaser, and afterwards taken from his possession tortiously, he may maintain an action of detinue against the wrong doer.

Writ of Error to the Circuit Court of Perry.

THIS was an action of detinue at the suit of the defendant in error. The cause was tried on the general issue and a verdict and judgment rendered for the plaintiff. A bill of exceptions was sealed at the instance of the defendant, from which it appears that the plaintiff having made due proof of a bill of sale from Mary Tillman to himself for the slave sought to be recovered, dated the 7th February, 1841, read the same to the jury—proved that the slave was delivered to him by his vendor upon the execution of the bill of sale, and remained in his possession until December, 1842, when he removed to South Carolina, carrying the slave with him. In the winter or spring of 1843, the defendant went to South Carolina, took the slave from the plaintiff's possession, and brought him to Perry county. There was evidence tending to show, that defendant said his object in taking possession of the slave was to secure a debt which the plaintiff owed him.

A son of Mrs. Tillman and her deceased husband was introduced as a witness for the defendant, who testified that the slave in question, with some twenty others belonged to his father, at his death, an event which occurred in 1836; and that these slaves, and all the other property of the estate, went into possession of Mrs. Tillman, the plaintiff's vendor, who administered thereon—all of which, with the exception of the slave sold to plaintiff, still remains in her possession.

The defendant's counsel prayed the court to charge the jury, that if the slave in question was the property of the intestate's estate, and Mrs. Tillman held him as administrator thereof, then the sale by her to the plaintiff being private, and without the order of the orphans' court, conferred no title on him, and he cannot recover in this action. This charge was refused—the court being of opinion that there was no satisfactory proof that Mrs. Tillman's possession was as the administrator of her husband's estate, but if the proof upon this point was satisfactory, the manner in which the sale was made to the plaintiff, could not prejudice the plaintiff's right to recover.

A. GRAHAM, (of Perry,) for the plaintiff in error, insisted that to entitle the plaintiff to recover in detinue, he must prove a title to the thing sought to be recovered. Here the sale from Mrs. Tillman to the plaintiff, having been made privately, and without an order of court, no title vested in him, and he cannot recover of the defendant, though the latter may show no right to the slave. An examination of the evidence recited, will very satisfactorily show, that the charge prayed is not abstract. He cited 2 Starkie's Ev. 493; 2 Steph. N. P. 1309; 4 Ala. Rep. 442-521.

No counsel appeared for the defendant.

COLLIER, C. J.—We will consider this case upon the assumption that the charge prayed was pertinent to, and suggested by, the facts proved. The questions then are, did the sale of the slave by Mrs. Tillman to the plaintiff vest the title in him, and if it did not, can the defendant avail himself of its invalidity?

In *Weir v. Davis and Humphries*, 4 Ala. Rep. 442, it was decided, that an administrator is not authorized to sell the personal estate of the intestate at private sale, and the purchaser under such circumstances does not acquire a valid title. But it was said, that although the title of the estate is not divested by the unauthorized sale, yet it does not follow that a creditor can subject the property to sale under execution.

To entitle the plaintiff to recover in an action of *detinue*, he must prove either a general or special property in the chattel and a right to the immediate possession. A bailee may maintain *detinue* or *trover* against a stranger who takes the goods out of his possession; and this whether the bailment be general or special, gratuitous or for a reward. So may a factor or other consignee, pawnee or trustee. [1 Ld. Raym. Rep. 276; 2 Bing. Rep. 173; 2 Taunt. Rep. 302; 1 B. & A. 39; 1 Saund. Pl. & Ev. 435; 2 Stark. Ev. 493, 494.] In the citation from Saunders on Pleading and Evidence, it is said, that the proof which establishes a right of property in the plaintiff, is similar in *trover* and *detinue*; and in respect to the former it is laid down, that in general, possession of a chattel is *prima facie* evidence of property in the possessor; but if the plaintiff has never had possession of the chattel, or if the contest be not with a mere stranger, but with one who will succeed in his proof of title, unless the plaintiff can prove a better, it is necessary for the latter to resort to strict evidence of title. [3 Stark. Ev. 1483.] If therefore the action be brought against a wrong doer, the mere fact of possession by the plaintiff, is usually sufficient evidence of title, although the plaintiff claim under a title which is defective. For the possession of property is *prima facie* evidence of ownership. [Id. 1488; 2 Saund. on Pl. and Ev. 878-9; 2 Miss. R. 151; 1 Dana Rep. 110.] If the possession of goods be tortiously taken, the plaintiff may waive the wrongful taking, and maintain *detinue*. [1 Miss. Rep. 749; 2 A. K. Marsh. Rep. 268; 4 Ala. Rep. 669.]

Although Mrs. Tillman, as the administrator of her husband's estate, was not authorized to sell the slave in question at private sale, and without an order directing his sale, yet the delivery of possession invested the plaintiff with the right of retention against every person who could not show a superior title. His purchase and possession gave him the semblance of title, defective it is true, but quite sufficient as against a wrong-doer. Because his purchase was ineffectual to pass the absolute right, the possession which was yielded to him, cannot be considered as so entirely void, that it may be divested at pleasure by one who makes no pretence of

title. The plaintiff, we think, may be regarded as favorably as a gratuitous or general bailee; and as these may maintain detinue upon their possession and liability over, may he not invoke the same reasons in favor of his right to sue?

The evidence recited in the bill of exceptions clearly indicates that the defendant was a mere trespasser—the fact that the plaintiff was his debtor cannot place him in any other predicament. For however this may be, no man can, without the agency of the law, seize the property of his debtor for the purpose of collecting or enforcing a payment of his debt. It follows that the circuit court, in disallowing the defence, ruled the law correctly—its judgment is consequently affirmed.

SPEIGHT v. KNIGHT.

1. The removal of a guardian from the State is a sufficient reason to displace him from the trust, whenever in the discretion of the court he as a non-resident would not have been appointed in the first instance.
2. When a guardian is sought to be removed for this cause, he is entitled to fourteen days' notice of the application, and if personal service cannot be made of the citation, he may be called on by publication.
3. The validity of a guardian's appointment cannot be called in question in the subsequent proceedings by him for a settlement, or assigned as error on the record of settlement. Error in the appointment of a guardian, &c. can only be reversed in a direct proceeding on the appointment.
4. In proceeding against a guardian, &c. who has removed from the State without making a settlement, he is entitled to three months' notice by publication of the day on which he is required to state his accounts.
5. *Quere*—Whether under the statute when a guardian, &c. has removed from the State, the orphans' court can proceed to decree the account stated by it at the same term when it is stated; or whether the guardian, &c. is not then to be cited to a final settlement as in other cases.

Writ of Error to the Orphans' Court of Henry.

THE proceedings of the orphans' court connected with the questions raised by the assignments of error, may be thus stated :

On the 3d March, 1845, the court made an order appointing Knight guardian of Josiah A. Cawthorne, reciting as the cause for doing so, that Speight, the former guardian, had removed out of the State. At the same time, the newly appointed guardian having given the required bond, prayed that Speight might make a final settlement of his accounts with the ward. On this application, an order was made setting the 17th of April, 1845, for auditing and examining the accounts, "at which time all persons interested might attend and object if they saw proper." It was also ordered that notice be given to certain named persons, as sureties for Speight, and to another person as the executor of one who in his lifetime was also one of the sureties, to attend at that time and show cause, if any they could, against the order and decree which the court might then make in the premises. Also that notice be given by publication in Eufaula until the day of hearing, and by posting the order, &c.

The next order which appears in the cause was made the 23d of June, 1845. This recites the previous proceedings in regard to the appointment of Knight; his prayer that Speight, the former guardian, should state and settle his accounts with the ward. This further recites, that the order then made was, "that on the 17th of April, 1845, the accounts would be audited and reported for final settlement, to take place on the fourth Monday of June, when and where the parties could attend," &c.

It then proceeds that "on this day came Richard Knight, guardian, &c. and prays that the accounts of Moses K. Speight, former guardian, as stated by the said court on the 17th of April, 1845, and reported to this court for allowance, be allowed; and it appearing to the satisfaction of the court that proof of the intention of said guardian to have his accounts so stated as aforesaid and presented to the court for allowance at the present term, was duly posted up in three public places in the county, and [published] in the Eufaula Shield, a newspaper, &c. for forty days previous to the present term. And no exceptions being made to the same, and

it appearing that Moses K. Speight, former guardian as aforesaid, is chargeable," &c. The court proceeds to render judgment against him for \$1453 58, the balance due on the account so stated in favor of Richard Knight, the present guardian of the minor, and awards execution for that sum.

If any proceedings were had by the court on the 17th April, 1845, they are omitted from the transcript, and there is nothing from which it can be inferred, either that Speight himself stated any account, or that the court did so at any time previous to the 23d June, 1845.

Speight now prosecutes this writ of error, and here assigns that the orphans' court erred—

1. In removing him from the guardianship.
2. In proceeding at the suit of Knight instead of the minor.
3. In not giving any notice to the party that his account would be stated and audited for final settlement, and in not giving any other notice.
4. Because the sureties were notified by the publication, instead of the guardian.
5. Because no sufficient reason appears for the judge to state the account, and because the account was thus stated.
6. Because the notice of final settlement was insufficient, and several other assignments of a similar nature.

BELSER and BUFORD, for the plaintiff in error.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. We are not aware of any statute which declares the removal of the guardian from the State shall be a ground for displacing him; and there are enactments which allow non-resident guardians to secure the estates of their wards within our jurisdiction as well as others, which evidently contemplate that a resident guardian may on receiving the assent of the orphans' court, remove the estate of his ward elsewhere, under certain prescribed conditions. [Digest, 170, § 17, 18; Ib. 171, § 20, 21.] In the absence of specific legislation on this subject, it is possible the orphans' court, in its exercise of general power over this subject, may possess the power to commit the guardianship of a

minor to a non-resident under peculiar circumstances, but the general rule doubtless is to appoint a resident guardian. This seems to be indicated by the act of 1843, which evidently points to the removal of an executor, administrator or guardian, as a circumstance which will authorize the orphans' court to call the individual to a final settlement of his trust. [Digest, 230, § 47.] That court is invested also with the general power to displace a guardian on sufficient cause being shown. [Ib. 267, § 4.] Hence we conclude, that although the non-residence or removal from the State of the guardian is not a matter which imposes the duty on the court to displace him absolutely and in all cases, yet it is a ground for removal whenever in the discretion of the court a non-resident guardian would not be allowed in the first instance.

2. Conceding, then, that the orphans' court has the power to displace a guardian on the ground of his having removed from the State, the question arises, what is the proper course of proceeding to remove him. There is a single instance in which the court is permitted to displace an executor, administrator or guardian without notice, and that is when he is charged with a breach of duty, and it is made to appear he has removed from the State or otherwise endeavored to elude the service of process on the complaint. [Digest, 221, § 5.] In general, when the court proceeds to the removal of a guardian for any cause not covered by the enactment just referred to, it is requisite to give him fourteen days' previous notice by citation to appear and show cause why he should not be displaced. [Digest, 267, § 5.] Under these statutes we incline to think the proper course is to state a complaint in writing against the guardian, specifying the grounds on which his removal is sought, on which the necessary citation is issued, and if not made known by personal service on the ground, is not within the provisions of the statute, which warrants a summary removal without notice, the service would be made effectual by publication of the order to appear.

3. It does not appear here that notice was served on the guardian, that publication was made, or that there was proof to the court of any breach of duty warranting a removal without notice, and the appointment of the succeeding guardian,

is clearly irregular; but this, in our judgment, is a matter which can be revised only in a direct proceeding with reference to the appointment. The validity of the appointment of Knight is entirely collateral to the settlement between him or his ward and the former guardian. In all testamentary and guardianship causes the appointment of the administrator or guardian is a distinct act of the court, which cannot be collaterally impeached, and which, however irregular, is not open to inquiry in the subsequent proceedings. This precise question was thus ruled in regard to the probate of wills in 7 Ala. Rep. 9.

4. Viewing the proceedings in this cause as a settlement of the guardian's account by the orphans' court, it is evident there is no conformity with the statutes. The first section of the act of 1843 provides, that when any executor, administrator or guardian shall have removed beyond the jurisdiction of the court granting the letters, without having settled his accounts, the court may on the application of any one interested, cause notice to be given by advertisement, requiring the executor, &c. to file his accounts and vouchers for settlement at a regular term of the orphans' court, to be holden not less than three months from the date of the notice. In the event of the failure of the executor, &c. to appear and file his account and vouchers for settlement, the judge is required to state the account on the best information he can obtain, "and proceed to settle and decree on the same as is now required by law: *provided*, that if said executor, &c. shall appear and file his account and vouchers for settlement, and pay all such costs as may have accrued in consequence of his defalcation at any time before the final hearing of the account stated as aforesaid, and decree thereon, it shall be the duty of the court to set aside the proceedings aforesaid, and to audit and settle the account filed by the executor, &c. in manner and form as now required by law. [Digest, 230, § 47.] And from this it will be seen that the three months' notice required to be, was not given. The order for settlement was made the third of March, and the day set for the settlement was the 17th of April. It is true, the account was not stated until the 23d of June afterwards, but this circumstance cannot validate the

proceedings, which are entirely irregular for the omission of the statutory notice.

5. In proceeding under this section of the statute, it deserves consideration whether a final decree can be made at the same term as that at which the account is stated by the court, and also whether, when the account is stated, the executor, &c. is not to be cited, as well as all others interested in the final settlement, as in other cases where the account is stated by the executor, &c. It will be seen, we think, that there is considerable difficulty in the construction of this section, as the proviso seems to indicate the right of the executor, &c. to set aside the proceedings at any time before a final decree—a privilege which would be of little value, if the final decree was a consequence of stating the account. Independent of this, there seems good reason to suppose a publication is necessary, because others than the executor, &c. may be concerned in the final adjustment of the account, besides the party at whose instance the proceeding is had. We throw out these remarks, to invite the attention of suitors interested in the proper construction of this statute, without intending to conclude any thing by these *queries*.

The result of what has been said is sufficient to indicate that this proceeding is fatally defective, and therefore the judgment is reversed, and the cause will not be remanded, inasmuch as the first step is defective. It is scarcely necessary to advert to the form of the judgment in the name of the guardian instead of the ward, as that is covered by repeated decisions.

Judgment reversed.

ROBERTSON V. COKER, ET AL.

1. It is a sufficient excuse for an officer in not returning an execution, that that the plaintiff authorized him to hold it up.

2. A constable's bond may be delivered as an escrow, to become the bond of the parties on the performance of a certain condition.
3. Sureties to a constable's bond, may litigate the liability of their principal, as a judgment may be rendered against him, on a notice to them.
4. A constable is not a competent witness for his sureties, though released by them.
5. The sureties of a constable, who knowingly permit him to act under an insufficient bond, will be held responsible upon it.

Error to the Circuit Court of Talladega.

THIS proceeding commenced by notice against one May, a constable, and Joseph Coker, Thomas L. Best, and Solomon Spence, his sureties, for failing to return an execution in favor of the plaintiff in error, against one Elliott, and judgment being rendered thereon, in favor of the plaintiff against the sureties, they prosecuted an appeal to the circuit court.

The sureties appeared in the circuit court, and pleaded—

1. Taking issue upon the allegations of the notice.
2. That one Cox was the party really interested in the judgment, and that one Blythe, as his agent, delivered the execution to the constable, and authorized him either to return the execution, or to retain the same beyond the time when the same was returnable, at his discretion.
3. They craved oyer of the bond executed by the constable, and upon which they were sought to be charged. The bond was set out on oyer, and is in the usual form, purporting to be made by the constable, and the defendants as his sureties, and approved by the judge of the county court. The plea then proceeds *actio non*, &c., because they say they agreed to sign, and did sign, the bond, and deliver it to Alexander J. Cotton, clerk of the county court, with the distinct agreement and understanding, at the time, between all the signers to said instrument, and said Cotton, that the same was an escrow, and only to be considered as a bond upon condition that one William Curry and Allen Elston should sign said writing with these defendants, and it was distinctly agreed, that said instrument, so signed and delivered, should not be obligatory on them unless Elston and Curry

executed the same, and they aver that Elston and Curry never signed the same, and that it was never delivered to the judge of the county court, and this, &c., wherefore, &c.

To these pleas the plaintiff demurred, and the court overruling his demurrer, he then took issue on the pleas.

The plaintiff then introduced Cotton, the clerk of the county court, who denied knowing any thing of the conditional delivery, except as to Best, who said something on the subject to him, but he had no distinct recollection on the subject. He further testified, that this was the only bond in the office ever executed by May as constable, and that he had been acting publicly as a constable in the county, from a few days after the date of the bond, until about the first of the year 1846; that the defendants were all citizens of the county, and did not live far from May.

The defendants then, by an instrument under seal, released May from all liability to them, from any verdict or judgment which might be rendered in the cause, and offered him as a witness. The plaintiff objected, on the ground that the release did not remove his interest, but the court overruled the objection, and permitted him to testify. He then swore to facts conducing to prove the allegations in their plea, of the conditional delivery of the bond. He also admitted, that he had acted as constable from the date of the bond until about the 1st January, 1846; and that the defendants knew he was acting as constable. That in 1845, Best told him, he would not stand longer as his security, if he did not get other securities on the bond, and that during the time he had acted as constable, he had served notices on Coker, and had done official business for the sureties. This being all the evidence, the plaintiff's counsel asked the court to instruct the jury, that they ought not to find the issue formed on the third plea, in favor of the defendant—which the court refused.

Further, that if they believed that the bond had been left by the signers in the clerk's office, and had been approved by the judge of the county court—that May had acted as constable from the date of the bond to the 1st of the year 1846, and that the defendants knew, during that time, that the bond was approved, and in the clerk's office, and that May

was acting as constable, then the jury were authorized to infer an acquiescence in the bond, or a ratification of it on their part. The court refused to give this charge, and charged, that these were circumstances which the jury might weigh, in connection with the proof, in determining whether the defendants acquiesced in his thus acting, upon their responsibility, or not.

That if the jury believed the plaintiff, or his agent, had, by any fraudulent practices, or conduct, induced the constable not to return the execution within the time required by law, then they ought to find for the defendants. To all these charges, and refusals to charge, the plaintiff excepted, and assigns all the matters arising out of the bill of exceptions and the judgment of the court on the demurrers to the pleas, as error.

RICE, for plaintiff in error.

1. In a summary proceeding, under the act of 1824, against a constable and his securities, for the failure of the constable to return an execution, if the plaintiff is successful, he is entitled to judgment against the constable *and* his sureties, provided three days notice of the motion is given to the constable *or* his securities. And therefore, if the notice has been served on the securities, the constable is not a competent witness for them, although they release him from liability to them. [Clay's Dig. 219, § 87; McRae, et al. v. Colclough, 2 Ala. Rep. 74; see also, Condry & Henley v. Murphy, 4 S. & P. 9; McMahan v. Kyle, 9 Por. 507.]

2. When the constable is a party, any plea by the securities alone, denying his liability is bad. [McClure v. Colclough, 5 Ala. R. 65; Price v. Cloud, 6 A. R. 248.]

3. Where the constable has received no instructions of the plaintiff upon the record, or his attorney, he cannot defend such a rule on the ground that a third person has given him discretion to return or not return the execution—although the constable may alledge such third person to be the owner of the execution. [Crenshaw v. Harrison, 8 Ala. R. 342.]

4. A constable's bond, dated in April, 1844—approved in writing by the county court judge—on file in the proper office for more than a year—cannot be avoided by the securi-

ties by an alledged agreement between the signers thereof and the clerk of the county court, that it was not to be binding on them until two other persons signed it; especially when it is shown that such agreement was never communicated to the judge—when this was the only bond given by the constable, and when the constable has been all the time acting as constable within the knowledge of the sureties. [Price v. Cloud, 6 Ala. R. 248; McClure v. Colclough, 5 Ib. 65.]

5. When a plea is filed by two or more jointly, if it is bad as to one, it is bad as to all. So if the plea as pleaded is good as to all, but is sustained by evidence only as to one, it is no defence for any of the defendants. [Moors v. Parker, 3 Mass. Rep. 310; 6 Comyn's Dig. 136, (E, 36.)]

6. Even if the fraud of a plaintiff in execution can be a defence for a defaulting constable, the fraud must be specially pleaded. Every matter of excuse must be specially pleaded. [Hallett v. Lee, 3 Ala. Rep. 28.]

Under the pleas, the question of fraud was not raised, and therefore the court erred in its charge in relation to fraud.

W. P. CHILTON, for defendant in error.

1. This being a rule against the constable and sureties under the act of 1824, (Clay's Dig. 219, § 87,) no judgment can be rendered against the sureties, unless the constable is also before the court. The statute requires the judgment should be rendered against *him* and his sureties. *He must be a party*, and if dead, this summary remedy fails. [Logan v. Barclay, 3 Ala. R. 361; James v. Auld, 9 Ib. 462.]

The same rule applies to constable's sureties that applied to sheriffs before the passage of the act. So, when a sheriff, before the act last named, had absconded, no summary judgment could be rendered against his sureties. [Orr v. Duval, et al. 1 Ala. R. 262.] The statute being penal, and in derogation of the common law, must be strictly construed. [Ib.]

If this view is right, the court should have sustained the demurrer to the suggestion—plaintiff has no right to recover upon the case he presents by his pleading, and is not injured by any error of the court in reference to the collateral mat-

ters involved; hence this court will not reverse. [Turcott v. Hall, 8 Ala. R. 522; Smith v. Houston; Ib. 736.]

2. But if the action is sustainable, there is no error; the court very properly overruled the demurrer to the pleas, under the authority of Bibb, judge, &c. v. Reid & Hoyt, 3 Ala. R. 88, which case it is conceived directly sustains the pleas demurred to, as also the legality of May's evidence. Being released by the sureties, he has no interest, and is clearly competent. [See same case; Brown v. Brown, 5 Ala. Rep. 508.]

ORMOND, J.—The demurrers to the pleas were correctly overruled. An instruction by the person beneficially interested in the judgment, or by his authorized agent, to the constable, not to return the execution, is a sufficient warrant for his holding it up. The facts alledged in the third plea, constitute a defence, because if true, they establish that the bond upon which the motion is predicated, was never delivered by them as their bond, but upon a condition which has not been performed. [Reid & Hoyt v. Bibb, 3 Ala. R. 88.] The right of the sureties to litigate the *factum* of the bond, is clear in every case, where they are sought to be charged upon it. It is equally certain, that in motions under this statute, they may also litigate the question of the liability of their principal, as a judgment may be rendered against him, upon a notice to them. The cases of McClure v. Colclough, 5 Ala. Rep. 70, and Price v. Cloud, 6 Id. 248, rest upon a statute different from this.

The statute upon which this motion is founded, authorizes the plaintiff, when a constable has failed to return an execution, to move against him for the amount of the judgment, on giving three days notice to the constable, or his securities, and thereupon it is made the duty of the court to render judgment against him, and his securities. [Clay's Dig. 219, § 87.] It is no objection therefore, that he is not a party to the motion. The cases of Logan v. Barclay, 3 Ala. Rep. 361, and of James v. Auld, 9 Ala. Rep. 462, only established, that where the constable is dead, so that no judgment can be rendered against him, none can be rendered against his sureties,

as the statute requires the judgment to be rendered against him *and* his sureties, and that this defect was not remedied as to constables, by the act authorizing a judgment against the sureties of a sheriff, without including their principal.

From this it results also, that the constable was improperly admitted as a witness for his sureties, as a judgment could be rendered against him, although he had no notice of the motion; he had therefore a direct interest to defeat the motion, and against this interest it is obvious he could not be released by the sureties.

We are also of the opinion that the court should have charged the jury, that although the bond was originally delivered as an escrow, yet if subsequently the sureties suffered him to act under this bond, it would authorize the inference that they had waived their demand of additional sureties, and had consented to be bound by it as it stood. It would be a fraud upon the public, to permit them to lie by for such length of time, and suffer him to act without objection, upon a bond which the public had no means of knowing was insufficient.

Let the judgment be reversed, and the cause remanded.

PASCHALL v. WHITSETT.

1. It seems that a statute which merely gives a remedy at law, where it could previously have been available in equity only, or *vice versa*, may consistently with the constitution operate retrospectively; but whether the act of 1841, which gives the remedy by garnishment to the creditor of a corporation against a stockholder, where the latter stipulates to pay his subscription for stock as calls are made for it, entitles the creditor to garnishee the stockholder for what is due for the unpaid stock where he has paid all the calls of the company, is an open question.
2. A corporation is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and non-user;

and a stockholder of a corporation is not liable to the process of garnishment under the act of 1841, at the suit of its creditor after the dissolution of the corporate body.

3. The answer of a garnishee, that he had been informed and believed the corporation ceased to have "any legal existence" previous to the issuing of the garnishment, is equivalent to the assertion that it was dissolved; and if not negatived in the manner prescribed by the statute, will be taken to be true.

Writ of Error from the Circuit Court of Sumter.

THE plaintiff in error having recovered a judgment against the Gainesville and Narkeetah Rail Road Company, a corporation, made the affidavit required by the statute, and caused the defendant to be summoned as a garnishee. To the garnishment the defendant answered, denying an indebtedness to the corporation, or that he had any of its effects in his hands, and that he had no knowledge or belief of any one else who had any of its effects or was indebted to it. In answer to interrogatories, garnishee answered that in July, 1836, he subscribed for fifty shares in the company, rated at one hundred dollars each; and before the garnishment issued, he paid and advanced to and for the company more than the amount of all assessments made on his stock: That the subscription was not made by a writing under seal, but merely by signing his name for the shares stated, and that more than six years had elapsed after his subscription before the garnishment issued in this suit; consequently, he insists upon the benefit of the statute of limitations. Garnishee further answers, that the company previous to the issuing of the garnishment ceased to have any legal existence, as he is informed and believes. Upon this answer the garnishee was discharged, and a judgment rendered against the plaintiff for costs; which costs were remitted.

REAVIS, for the plaintiff in error, insisted that the act of 1841, (Clay's Dig. 260, § 8, 9, 10,) gave a remedy against a stockholder, by garnishment at the suit of a creditor of the

corporation co-extensive with that previously afforded by a court of equity. [See also Story's Eq. § 1252; act of 1835-6, incorporating the Gainesville and Narkeetah Rail Road Company.] The statute of limitations will not avail the stockholder in such a case. [Ball. on Lim. 371-2-3.] But, if it would, the statute had not completed a bar when the act of 1841 was passed, and the ninth section of this act creates a direct liability against the stockholder in favor of the creditor—thus arresting the progress of the statute.

The subscription for stock made the defendant liable under the charter to pay it all at once, and an action was maintainable immediately upon the refusal of the subscriber to pay. Any other remedy provided by the charter was merely cumulative. [3 Ala. Rep. 660; 5 Id. 787.] To entitle the creditor to proceed by garnishment against a stockholder who had failed to pay for his stock, it is not necessary that the corporation should have made assessments which he has failed to pay. Such might be the law independent of the act of 1841; but since its passage, a requisition by the company is immaterial. [See 5 Ala. Rep. 403.]

The general denial of indebtedness by the answer is contradicted by the facts specially stated. It is the necessary inference from these, that the garnishee was a debtor for stock in a sum equal to the plaintiff's judgment, which, including costs, was only about two hundred dollars. The dissolution of the corporation cannot prejudice the rights of its creditors. [Story's Eq. § 1252]; and if upon the record the circuit court should have rendered a judgment against the garnishee, this court will now do it.

J. BLISS and BALDWIN, for the defendant in error, contended that the proceeding by garnishment was a legal remedy, (5 Ala. Rep. 442,) and the act of 1841 only gives to the creditor of the corporation the benefit of this remedy, but does not make the stockholder or other person a debtor who was not previously such. Here the answer not only denies an indebtedness, but states facts which sustain the denial, and does not warrant a judgment against the garnishee. [1 Smede & M. Rep. 541; 2 Stewt. Rep. 86; 3 Port. R. 105; 6 Id. 365; 3 Ala. Rep. 312.] If there was no cause of ac-

tion at the suit of the company, certainly its creditor is in no better condition, and cannot recover. [6 Port. Rep. 365; 5 Ala. Rep. 403; 6 Mass. Rep. 60.] If the assessments were paid, the last citation shows there was no indebtedness, and the garnishee may insist upon his advances for the company as a set off, (1 Stewt. Rep. 9; 6 Ala. Rep. 818,) or the statute of limitations as a bar. [9 Pick. Rep. 144.]

Between the subscriber for stock and a creditor of the corporation, the relation of trustee and *cestui que trust* does not exist; whether the corporation does not hold the money after the stock has been paid for, in trust for creditors, is a very different question, which it is not necessary to consider. The creditors of a partnership have a lien upon the effects of the concern paramount to the claims of individual partners, yet this will not prevent the debtors of the partnership from availing themselves of the statute of limitations against the creditors. [Story's Eq. § 1253.] A creditor who proceeds by garnishment, may be met by every defence which could have been urged by the garnishee had he been sued by the person with whom he contracted.

If, as argued for the plaintiff, that the defendant was suable upon his subscription without a requisition having been first made by the company for its payment; this argument is conclusive to show, that there was no trust against which the statute of limitations would not run. [5 Johns. Rep. 90; 3 Ala. Rep. 756.] As to the effect of an assignment in bankruptcy, or of a trust in a will of personalty for the payment of debts to arrest the statute of limitations, see Chitty on Con. 6th ed. 828; 15 Ves. Rep. 479; 14 Cond. Eng. Ch. Rep. 500; 17 Id. 57; 17 Ves. Rep. 87.

The act of 1841 does not arrest the progress of the statute of limitations, or in any manner interfere with it—its purpose, as we have seen, was merely to extend a remedy which was previously applicable in many cases.

The act incorporating the Gainesville and Narkeetah Rail Road Company, is unlike the statute which was brought to the view of the court in 3 Ala. Rep. 660, and similar to that considered in 5 Ala. Rep. 403. The ground on which the garnishee was entitled to his discharge is inherent in the contract, and though it is competent for the legislature to vary

the remedy, they cannot, nor have they attempted by the act of 1841 to modify the contract. [13 Mass. Rep. 1; 15 Id. 447; 6 Pick. Rep. 451; 12 Id. 572; 3 Mason's Rep. 88; 1 Minor's Rep. 200; 2 Stewt. Rep. 228; 5 Stewt. & P. Rep. 276.] If the answer admits an indebtedness, it is for no definite amount, and no judgment can be rendered against the garnishee. [1 Stewt. Rep. 9.]

COLLIER, C. J.—The act of January, 1836, “to incorporate the Gainesville and Narkeetah Rail Road Company,” directed the commissioners designated therein to open books of subscription for stock, &c. and among other powers conferred upon the president and directors, authorized them to “require such instalments to be paid upon the stock, and at such times as they may [might] think best for the interests the said company.” *Further*, if any stockholder failed to pay the amount due upon his stock in pursuance of such call, the president and directors were authorized to sell his shares or such part thereof as they might think best, to the highest bidder; and if these shares should sell for less than their par value, the stockholder is made liable to pay the deficiency. Upon the failure of a stockholder to pay the amount of a call made upon his stock, or upon a deficiency after a sale of his shares, the president and directors having first given notice to him, &c. might recover the amount called for, or the deficiency, by motion for judgment, either in the county or circuit court of the county, in which the stockholder resides.

By the act of 1841, the plaintiff in a judgment against a corporation “is entitled to the rights and benefits of all the laws now in force regulating the issuance of writs of garnishment,” &c.; and upon an affidavit being made as directed, a garnishment is required to issue, summoning the “garnishee to answer what he is indebted as stockholder or otherwise,” &c. *Further*, the stockholders of any incorporated company “shall be liable, respectively, to the creditors of such company, for the amount of stock subscribed by them, and unpaid, in character of debtors to such corporation, and such liability may be enforced by garnishment, as above provided for.” *Again*: “The stockholder of any company compelled to

pay the whole or any part of the debts of the company of which he is a member, shall have the right to, and be deemed an assignee of the judgment, or so much thereof as shall have been paid by him, and shall be entitled to the remedy provided by law, for co-securities, to compel contribution from the other stockholders, or any of them." [Clay's Dig. 260, 261, § 8, 9, 10.]

The act incorporating the Gainesville and Narkeetah Rail Road Company, does not impose upon the subscriber for stock an immediate and absolute liability to pay the full amount of his subscription; but it contemplates a payment by instalments upon the requisition of the president and directors. In the language of this court in *Bingham v. Rushing*, (5 Ala. Rep. 403,) "It is therefore perfectly obvious, that until such call was made, there was no such indebtedness on the part of the stockholder as would authorize the corporation to maintain an action against him, either by the common law, or by the summary remedy given by the statute, (acts 1818-1823)—and if the corporation could not maintain the action because there was no indebtedness, it is clear the proceeding by garnishment cannot be maintained," unless it is given by the act of 1841. In *Cooper v. Frederick*, 9 Ala. Rep. 738, it is said the design of this act appears to have been to reach the stockholder as a debtor to the corporation, through his stock, and without any call of the company." If the enactment is constitutional, the court say that a judgment could be rendered against a stockholder when summoned as a garnishee, though he was not in default for calls made upon his stock by the directors.

It may perhaps be regarded as a settled principle, that the capital stock of a corporation is a trust fund for the payment of its debts, and a stockholder is not entitled to any dividend or share of its capital, until all the debts are paid. And if the stock should be distributed before the debts are paid, each stockholder receiving his share would be compelled to contribute *pro rata* to the payment of such debts, from the funds in his hands. But this is a remedy which can only be obtained in equity, where all the proper parties may be brought before the court, and the full amount of the debts, the mode of contribution, the number of the contributors, or

the cross equities and liabilities, which may be required for a proper adjustment of the rights of all parties, as well as of the creditors, ascertained. [2 Story's Eq. § 1252.] Whether this principle applies to stockholders whose shares have not been paid or called for, we will not now stop to inquire.

In respect to the constitutionality of the act of 1841, several questions suggest themselves: 1. Did the subscription for stock, under the terms of the charter, impose a present liability upon the stockholder, or does not the times of payment and amount of instalments depend upon the requisition of the directory? Does not the charter require that the assessments upon each share should be equal, and if one stockholder should, by process of garnishment, be compelled to pay for all his stock, would not the requisition operate unequally, and practically modify the contract, which the subscription and charter evidences? We do not propose to answer these questions at this time. It may be conceded, that a statute which merely gives a remedy at law, where it could previously have been made available in equity only, or *vice versa*, may consistently with the constitution operate retrospectively, so as to embrace contracts already made. Perhaps, if the president and directors of a corporation under a charter such as that before us, failed to call for instalments as their duty required, a court of equity might be resorted to, by a creditor, and upon the stockholders being brought before the court, an assessment could be made upon each one of them agreeably to the spirit of their subscription and the charter.

At common law, upon the dissolution or civil death of a corporation, all its real estate remaining unsold reverts back to the original grantor, or his heirs, for the law annexes a condition to every gift or grant, that if such body politic be dissolved, the donor or grantor shall not re-enter. The personal estate vests in the king; in this country in the people, or State, as succeeding to this right and prerogative of the crown. The debts due to and from the corporation are totally extinguished; so that neither the members nor directors of the corporation can recover, or be charged with them in their natural capacities; according to the civil law maxim, *si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.* [Ang. & A. on

Corp. 128-9, 667.] In *Mumma v. The Potomac Company*, 8 Pet. Rep. 281, it was said, that a corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchise, and by a forfeiture of them for wilful misuser and nonuser. Every one must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation, should force upon it a perpetuity of existence, contrary to public policy, and the nature and objects of its charter: *Further*, that a *scire facias* to revive a judgment cannot be maintained against a dead corporation any more than against a dead man. [See 1 Bla. Com. 485; 3 Step. Com. 187.]

The act of 1841, requires the debtor of the company to state what he is indebted to it, *as stockholder, or otherwise*. Its terms, as well as the character of the proceeding, suppose that there is a subsisting indebtedness, though it may not have matured, or the contract out of which it arises may not be absolute. A corporation is an artificial body, depending for its existence upon a legislative act, to which it either mediately or immediately owes its vitality. It may exist *ad infinitum*, or its being may be limited, and although there may be no limitation, expressly prescribed, it is subject to dissolution and civil death in various ways. But for whatever cause it may become defunct, we have seen that the "debts due to and from it are totally *extinguished*;" and in no just sense can one be said to be its debtor, either as a stockholder or otherwise. A corporation, after dissolution for all legal purposes, is a nonentity, incapable of suing and being sued, and a judgment which assumes that a garnishee is its debtor, is untrue in point of fact, as well as law. Whether the creditors have a remedy in equity against the real and personal estate, or the debts which were due to a corporation that is civilly dead, we need not inquire; for however this may be, it is certain that there is no right to proceed by garnishment under the statute.

It has been repeatedly decided by us, that the answer of a garnishee, if not controverted, will be taken to be true. We

must then understand in the present case, that the affirmation in the answer, that the garnishee was informed and believed, that the corporation ceased to have "any legal existence," previous to the issuing of the garnishment, is equivalent to an assertion that it was dissolved; and that the fact of dissolution is conceded—leaving its effect only to be decided by the court. By this we have seen, its debts, and of consequence the legal remedies for their collection are extinguished. This view is decisive of the cause, and relieves us from considering the other questions made at the argument. The judgment of the circuit court is therefore affirmed.

DE WITT v. BIGELOW & Co.

1. The circumstance that the plaintiff has been condemned in the costs of one term, as the condition of a continuance, does not make the judgment against the defendant irregular, if costs are adjudged against him at the final determination of the suit.
2. A deposition taken at the *office* of G. R. & Co. when directed to be taken at their *storehouse*, will be allowed, it being shown that they had an office under the same roof as their storehouse, and connected with it by doors and windows, and had no other office in the place.
3. A gratuitous agreement by the holder of a bill with the acceptor, made on the last day of grace, to look to him alone for the payment, and not to present the bill, or notify the drawer, does not relieve the drawer if the protest is made and notice given.

Writ of Error to the Circuit Court of Barbour.

ASSUMPSIT by Bigelow & Co. as the payees of a bill of exchange drawn by De Witt on, and accepted by McCullum & Dorsey, and protested for non-payment.

The cause was once continued by the plaintiff, on payment of costs of the term. Afterwards a general judgment for costs was rendered against the defendant on the verdict.

In the progress of the trial, the plaintiffs offered to read the deposition of a witness taken under a commission directing its execution at the *storehouse* of Green, Robbins & Co. The defendant objected that the certificate showed its execution at the *office* of Green, Robbins & Co. and it being proved that Robbins & Co. kept a saddlery store in Mobile, and had an office or counting room under the same roof with the store, and that the office was divided from the store only by a partition wall, with a door and glass window with side lights next the store, and that they had no other storehouse than as above stated, the deposition was admitted.

At the trial, there was evidence tending to prove, that on the last day of grace of the bill, and prior to the protest and notice to the defendant, the plaintiff, at the request of the acceptors of the bill, but without any consideration, agreed not to have the bill protested, or notice given to the different parties, but to look alone to the acceptors for payment—they, the acceptors, having assured the plaintiffs that the money would be paid very soon thereafter. There was no evidence showing the drawer had any funds in the hands of the acceptors, otherwise than that he had shipped them corn and cotton, which they had sold on time, but had not realised the funds—of all this the plaintiffs were informed before their said agreement. The amount of the corn and cotton so shipped was not specified. There was also evidence, that after the maturity of the bill, the defendant had paid the amount of it to the acceptors.

On this proof, the defendant requested the court to charge the jury—

1. That if the defendant paid the acceptors the amount of the bill, in consequence of the agreement before stated, the agreement was binding on the plaintiffs, although without consideration.

2. That if the plaintiffs, before the protest for non-payment, and before notice of the same to the defendant, without consideration, agreed to look to the acceptors alone for payment,

and if the defendant, induced by a knowledge of this agreement, failed to withdraw his funds, or subsequently paid the amount of the bill to them, then the defendant was discharged.

3. That if the plaintiffs, before protest and notice, without any consideration, but with the knowledge that the acceptors were in funds to meet the bill, agreed with them to look to them alone for payment, and if induced by a knowledge of this agreement, the defendant failed to withdraw his funds and subsequently paid the acceptors the amount of the bill, then the defendant was discharged.

These several charges were refused, and the defendant excepted to the refusal, as well as the previous admission of the deposition objected to.

These several matters are assigned as error, as is also the judgment for costs.

BURD, for the plaintiff in error, insisted—

1. That the judgment carried the entire costs of the suit when the defendant was discharged of them for one term.

2. The direction of the commission is to be strictly pursued—the office is certainly not the storehouse, and one might well go to the latter and not finding the commissioners there, go away without looking into the office.

3. As to the main questions arising out of the refusal to charge, he insisted that if any agreement to give time is made, it will discharge the parties. [Chitty on Bills, 409-10, 413, and cases there cited.] The agreement being made on the last day of grace, was part and parcel of the demand, and qualified it—in fact made it no demand. It is said, if the holder informs the drawer, that he has settled with the acceptor, this is a discharge. [Story on Bills, § 252.] The agreement here was on a sufficient consideration, as it has produced injury to the defendant relying on it.

BELSER, contra.

GOLDTHWAITE, J.—1. A judgment for costs, in general, is the necessary consequence of the failure by a party to the suit to sustain his claim, or defence, but their amount is

seldom, if ever, stated in the judgment entry. It is usually impracticable to ascertain the exact sum until the costs are taxed by the proper officer, and several of the items for which the party is chargeable depends on the subsequent action upon the judgment itself. The judgment is technically said to open to secure the amount of the costs, and if these are improperly taxed, or more than the entire record will warrant, is taxed, the remedy of the party is by motion to the court to retax them. The judgment in this case is in the usual form, and we can perceive no reason why that should be changed, because at another stage of the cause, the other party has been condemned to costs to a particular extent.

2. The next point made arises upon the refusal to exclude the deposition of the witness, because the commission was executed at the *office* of Green, Robbins & Co. instead of their *storehouse*. Without expressing any opinion whether the *prima facie* intendment should, or should not be, that these terms are convertible, we are clear it was competent for the plaintiff to show that the *office* of these persons was, in point of fact, adjacent to, and a part of, their *storehouse*, and such we understand to be the effect of the evidence stated. We have several times held, that it would be intended the commissioners had acted within the time prescribed by the commission, although it was not so expressly stated in the return. [Sandford v. Spence, 4 Ala. Rep. 237; Dearman v. Dearman, 5 Id. 202; Olds v. Powell, 7 Ib. 652.] And in Jordan v. Hazard, 10 Ala. 221, it was held, that the examination of a witness with a different middle name would be intended as the one named in the commission; and it has been held elsewhere, that a commission directed to be executed at the house of J. A. E. would be admitted if taken at the house of J. E. as the presumption would be, they were the same person. [Elmore v. Wells, 1 Hayw. 359.] So it is said, that proof is admissible to show the deposition was taken at the proper place, although that was omitted in the caption. [Anon. 2 Hayw. 244.] We therefore are entirely satisfied that if these authorities do not justify the inference that *office* and *storehouse* are equivalent terms, when used, • the one in the commission and the other in the return, they warrant the party in showing their identity.

3. The question arising on the supposed merits must also be determined against the defendant. The agreement asserted as made between the payee of the bill and the acceptor, was of no effect as a contract, because there was no consideration to sustain it. It is immaterial whether this agreement was made before or after the bill was protested, as in either case its legal effect is the same. If the payees of the bill, in consequence of this agreement had omitted to notify the defendant of the non-payment of the bill, it is very possible he would have been discharged under the circumstances, but even then, not in consequence of the supposed contract, but rather because of the neglect to give notice. The refusal or neglect to comply with what was then agreed upon, involves no legal consequences, as it was entirely voluntary. The rule is now perfectly well understood, that a mere gratuitous engagement to wait with the acceptor will not discharge the other parties.

We can see no error in the record. Judgment affirmed.

PROSSER v. HENDERSON.

1. To justify an inference of fraud, from the price given for a slave, in a purchase from an insolvent man, it should be clearly inadequate—evidently below the market price. The fair interpretation of the terms, “value, or about the value,” of a slave, is not much above or below the market price.
2. When a title is acquired *bona fide* to a slave, it is not a badge of fraud, that the purchaser suffers him to go into the possession of a former owner of the slave, for a short time, although he is insolvent; he having parted with the title, and the slave having been out of his possession for two years previous.
3. A party has no right to ask a new, and substantive charge to the jury, on their returning into court for an explanation of the charge previously given, or for the purpose of having it again repeated.

Error to the Circuit Court of Chambers.

TRIAL of right of property, between the defendant in error as claimant, and the plaintiff in error as plaintiff, in an execution against John A. Wicker, which was levied on a negro man named Bob.

Upon the trial it appeared in evidence, that about the 27th of October, an execution amounting to about \$427, in favor of the Bank at Montgomery, issued against Wicker, and one Brooks as his surety, and was levied on the slave in controversy, then the property of Wicker, who applied to Brooks to aid him in settling it. Wicker furnished about \$90, and Brooks the residue, and satisfied the execution, the latter taking from Wicker a bill of sale of the slave for the consideration as expressed in it of \$427, and with the understanding, that Wicker might redeem him in a short time. The negro remained in Wicker's possession, and the bill of sale was not recorded.

The slave remained in possession of Wicker, until February, 1843, when he was again levied on by execution in favor of one Thrash, for between one and two hundred dollars. Brooks discharged this execution, and took the negro into his possession, who was proved to be worth at least \$600. Subsequent to this time, Wicker proposed to redeem the negro from Brooks, but he refusing to permit him to do so, on the 3d March, 1845, the former filed his bill in chancery to compel the redemption of the slave. The bill was not answered by Brooks, and on the 22d April, 1845, Brooks, Wicker and the claimant met together, and claimant said he wanted Brooks and Wicker to settle the chancery suit, and all their differences. Brooks claimed to have advanced for Wicker \$475, and to get out of law, offered to give Wicker \$25 and keep the negro, and to take from him \$500 for the slave, he (Wicker) paying the costs of suit. Wicker refused to accede to either proposition. The claimant then expressed his opinion that the offers were fair, and that he would take the negro if Wicker would agree to it, which he did. The claimant then paid the purchase money to Brooks, and received from him a bill of sale for the slave, and by his directions Brooks sent the slave the next day to Wicker's, who

continued there, until levied on in this case. Wicker afterwards dismissed the bill at his own costs. It was also proved that Henderson, the claimant, was related by marriage to Wicker, and that in 1845, the latter was notoriously insolvent.

The claimant also proved, that at this time the negro was worth from \$500 to \$550, that he borrowed money to pay Brooks, and permitted the slave to remain with Wicker until harvest, as he had no use for him until then.

The court, after several charges which were not excepted to, further charged the jury, that if they found from the testimony that the sale from Wicker to Brooks was fair, and in good faith, and there was no secret trust for the benefit of Wicker, and if they further found that the claimant purchased the slave from Brooks, as shown in the proof, and paid his own money in good faith, and there was no secret trust for the benefit of Wicker; and if they further found, that the claimant paid the value, or about the value of the slave, then the claimant's purchase vested in him a good title, notwithstanding Wicker may have been insolvent, the claimant may have known it, and the slave may have gone into Wicker's possession, and remained there as shown in the proof; to which the plaintiff excepted.

After the jury had retired and deliberated about twenty-four hours, they returned into court, and requested the court again to charge, or rather to repeat the charge formerly given, in regard to the claimant's purchase. The court proceeded to repeat the charge heretofore set out, but gave no additional charge. The plaintiff then requested certain charges to be given, which the court declined to allow considered of, or certify. These charges so moved for, are found in a bill of exceptions afterwards certified by the court, but from the view taken of them by the court, need not be here stated.

These matters are all assigned as error.

S. F. RICE, for plaintiff in error, in support of his right to ask the explanatory charges, cited 2 Ala. 694; 9 Id. 56, 63; 1 Id. 18; 5 Id. 241; Collins v. Fowler, 10 Id. 858; 8 Porter, 546; 1 Ala. 506; 4 Id. 571; 6 Id. 881.

To show that a bill of sale absolute on its face, may be shown to be a mortgage, or upon trust for purposes of fraud, he cited 6 Ala. 598; 1 Porter, 328; 2 Id. 433.

That the facts in this case were sufficient to establish a fraudulent interest, he referred to 5 Ala. 531; 8 Id. 656; Id. 105; 7 Id. 269, 927; 5 Id. 324; 3 N. H. R. 415.

That the facts and circumstances attending the purchase by the claimant, demonstrated its fraudulent character, 6 Greenleaf R. 289; 8 Ala. 656; 4 Id. 203; 4 N. H. 309; 1 Ala. 37.

GUNN, contra, in support of the charge given by the court, cited 9 Ala. 382; 8 Id. 104, 656; 9 Id. 663; 3 Stew. 243; 1 Porter, 328.

To establish that the court could not be compelled to charge after the trial, and upon the return of the jury, he relied on 5 Vermont R. 136; 2 Id. 464; 1 Ala. 18; 2 Id. 694; 5 Littell, 221; 3 Hawks, 308.

ORMOND, J.—The charge of the court appears to us to be entirely unexceptionable. The *bona fides* of all the transactions between these parties, commencing with the first loan of money from Brooks to Wicker, down to the purchase by the claimant, were all left to the jury, and it was only in the event that they found that there was no secret trust in favor of the debtor, Wicker, and that the claimant purchased fairly, in good faith, with his own money, and that he gave a fair price for the slave, purchasing for himself, and without any secret trust in favor of Wicker, that he obtained a good title. The points of this charge principally objected to, are the expression that they must find that the claimant gave the value, or about the value of the slave. We consider this precisely equivalent to the terms fair price. The value of a slave must of necessity rest in opinion, about which individuals will differ, as they did in this case. To justify an inference of fraud, from the price given for a slave in a purchase from an insolvent man, it should be clearly inadequate—evidently below the market value or price. The fair interpretation of the terms “the value, or about the value,” is, not much above or below the market price. It is impossible,

that the jury could have been misled by these expressions; they are, in our opinion, sufficiently definite and precise, and if in the opinion of the counsel for the plaintiffs, they required explanation, it should have been demanded at the time.

It is further objected, that there was no circumstances, or fact in evidence, that explained the incongruity of the slave going into the possession of Wicker, after the purchase by the claimant. It is certainly the law of this court, settled by numerous cases, that where the vendor of personal property, continues in possession after an absolute sale, it is a badge of fraud, and that the vendor must satisfactorily explain, why it was, that the possession did not accompany the title. But in this case it must be remembered, that Wicker had been out of possession more than two years before the purchase by the claimant, the possession being all this time in Brooks, in whom was also the legal title, and the court expressly required the jury to find, that this title was in Brooks *bona fide*, and was fairly acquired by the claimant, to vest in him a valid title, and if so, that his title was not impaired by his knowledge that Wicker was insolvent, or by his permitting him to have the use of the slave. If this is not a correct legal proposition, then an insolvent man is cut off from all the charities of life. No one can safely buy property which had ever belonged to him, or do him an act of kindness. The argument urged here, and the cases referred to, are all to establish the want of good faith in the transaction, which resulted in the purchase by the claimant, but these are all matters upon which the jury have passed, of which they are not only the appropriate but the best judges, and about which the plaintiff has not thought proper to present any question for the revision of this court. In our opinion, the charge as given, presented the question in a fair, and intelligible point of view to the jury, and if it was considered ambiguous, or not sufficiently explicit, an explanatory charge should have been asked.

The refusal of the court to give the additional charges moved for, when the jury returned into court, is not a matter which can be here assigned as error. The right which

is secured to parties to except to any decision of the court, is confined by the express terms of the statute, to "exceptions taken on the trial of the cause." [Clay's Dig. 307, § 5.] If the jury return into court, and desire further, or explanatory charges, doubtless, if given, they may be excepted to, and additional or explanatory charges asked for, and if refused also excepted to. In this case, the court merely repeated its former charge, about which the jury had probably differed in opinion. This did not authorize the counsel on either side, to open the trial of the cause, by demanding new and substantive charges to be given. If this can be done, we can see no reason why the jury should not be required to be brought again into court, at any time before they have rendered their verdict, and additional charges required to be given by the court. Our conclusion is, that the right here insisted on does not exist.

Let the judgment be affirmed.

SELF v. HERRINGTON.

1. S. made his promissory note to H. for the payment of \$231 57, "for work done on a saw and grist mill, and waste way:" *Held*, that the statement of the consideration did not conclusively indicate that the note was a complete expression of the contract; and that it was competent for S. when sued on the note, to show what was the contract between the parties, that H. stipulated the work should be well done, should answer the purpose for which it was intended, &c.

Writ of Error to the County Court of Pike.

THIS was an action of assumpsit on a promissory note of the following tenor: "One day after date, I promise to pay

Philip Herrington, or bearer, two hundred and thirty-one dollars and fifty-seven cents, for work done on a saw and grist mill, and waste way. Oct. 13th, 1845." The cause was tried on the pleas of *non assumpsit* and "failure of consideration;" a verdict was returned for the plaintiff, and judgment was thereon rendered. From a bill of exceptions sealed at the trial, it appears that a verbal contract was made for the performance of certain work; after its completion, the defendant gave the note declared on, in consideration of the work. The defendant then proposed to prove—1. That the plaintiff warranted the work should answer the purpose for which it was made, and if it was not well done, then the plaintiff would pay for the materials and his board, and charge nothing for the work. 2. That this warranty was made some time before the note sued on was given. 3. When the note was given, the plaintiff stated the original contract was, that he, (the plaintiff,) would pay for the materials and his board, and would charge nothing if the work did not perform well; and that the work, so far from performing well was valueless. This testimony was rejected by the court, upon the ground that parol evidence was inadmissible to change or alter a written contract.

F. S. JACKSON, for the plaintiff in error, cited, 2 Starkie's Ev. 105, 242, and note B and X; 243, and note Y; 752, and note A; 753, and note A; 787, 788, 792, and note 1; 793; 3 Id. 1303, and note A; 1304 to 1309; 1 T. R. 121; 1 Ala. Rep. 42, 135, 357; 6 Ala. Rep. 146.

J. E. BELSER, for the defendant, insisted, that the verbal contract was merged in the writing, and that the latter could not be varied by extrinsic proof. [5 Potter's Rep. 498; 1 Ala. Rep. 161, 436; 5 Id. 521.] Such evidence has sometimes been admitted in cases of fraud and misrepresentation. [3 Stew. & P. Rep. 322; 1 Bay's Rep. 461; 6 Ala. Rep. 146.] Here the note expresses the consideration upon its face, and the parol testimony of an agreement previously or simultane-

ously made, was rightly rejected. [14 Mass. Rep. 154; 1 Cow. Rep. 250; 9 Ala. Rep. 513.]

COLLIER, C. J.—It is an unquestionable general rule, that where parties have entered into a contract in writing, they are presumed to have expressed their agreement truly, and cannot be allowed to add to, vary, explain or contradict it by parol testimony of stipulations previously or simultaneously made. The question is, does the present case form an exception to this rule. Where a writing has been executed by way of part performance merely of a parol agreement, it is said its incompleteness warrants the admission of extrinsic proof. This exception is familiarly illustrated where a chattel has been sold with a warranty not in writing, and a note given for the purchase money. In such case, the note does not merge the parol contract. [6 Ala. Rep. 146; 3 N. Hamp. Rep. 455; 8 Wend. Rep. 116.]

In *McCulloch v. Girard*, 4 Wash. C. C. Rep. 280, at the conclusion of a parol agreement, the defendant signed a paper promising in a general way to transfer certain shares of stock in a bank about to be organized, as soon as the books for that purpose should be opened. The court said it was a question of fact for the jury, whether the instrument was given in full execution of the parol contract, or in part only; "that if it should turn out that it formed part of the agreement that such a paper should be given; or that a paper of that description was in the ordinary course of defendant's business in respect to transactions of this nature, given by him; evidence of the parol contract will be proper, and will not violate any of the rules of evidence." So where there is a writing importing a sale of personal property, or any other like instrument of transfer, it will not preclude the vendee from proving an agreement between him and the vendor contemporaneous with the instrument, and consistent with its terms, that the value of the property should be applied to the payment of the defendant's debts. [5 Gill & Johns. R. 147, 157. See also, 6 Id. 107; 9 Pick. Rep. 338.] Parol evidence is said to be admissible to prove collateral and independent facts, about which the writing is silent. [1 Phil. Ev. 562, 563.]

The fact that the consideration which induced the making of the note is expressed upon its face, is not such a circumstance as conclusively indicates, that the writing is a complete expression of the contract of the parties. It serves to show what was the consideration, and dispenses with additional proof to this point. It proves what was the inducement to the making of the note, but does not set out what were the stipulations in respect to the work, or exclude the idea that there were any. The proof of the agreement then, on the part of the plaintiff, was independent of, and collateral to, the writing, and its admission consequently within the exception stated. The county court therefore erred in the exclusion of the testimony—its judgment is reversed and the cause remanded.

McCULLOUGH, ET AL. V. WALTON.

1. In an action of debt on the cautionary bond given on suing out an attachment, the declaration must show the process was wrongfully or vexatiously sued out by the plaintiff in attachment, even when it issues upon the affidavit of an agent: and the declaration is bad if it asserts the attachment was wrongfully and vexatiously sued out by the obligors in the bond.
2. If an attachment is wrongfully sued out, the plaintiff is responsible to the extent of the actual injury, but if vexatiously sued out, the case is one for vindictive damages, only in the event that the plaintiff has wantonly or maliciously resorted to the process.

Writ of Error to the Circuit Court of Macon.

DEBT by Walton on an ancillary attachment bond executed by the defendants, McCullough, Knox and Welsh. The condition of the bond recites the suing out of the attachment by McCullough at the suit of Madegan & Devon is to be void

“if the said plaintiffs prosecute their attachment to effect, and pay and satisfy the defendant all such costs and damages as he might sustain by the wrongful or vexatious suing out of such attachment.”

The declaration assigns the breach of the condition in these terms: “And the plaintiff further avers, that the said attachment was sued out by the said defendants wrongfully and vexatiously, and without any reasonable or probable cause for the suing out of the same for wrongful and vexatious purposes; that by such wrongful and vexatious suing out of said attachment, he has sustained damages to the sum, &c. by his slaves being levied on,” &c. &c. stating several matters of special damage, and proceeding to aver that neither the said defendants nor Madegan & Devon, or either of them, have paid such damages, &c.

The defendants demurred, but the court overruled the demurrer.

At the trial, the plaintiff put in evidence the papers of the attachment suit, &c. showing a levy by the sheriff on certain slaves, &c. He then proved that at the time of the levy, he resided about fifteen miles from Tuskegee, on a half section of land; that he had about him eight or ten slaves, and and also had a crop then growing; that at the time of the levy, he was on the grand jury as one of the jurors in Tuskegee.

The defendants then proved that Welsh, one of the parties to this suit, informed McCullough, the agent of Madegan & Devon, that the plaintiff was about to remove his property out of the State, and was then preparing to do so. McCullough therefore went to the attorney of Madegan & Devon and asked his advice whether or not he should sue out an attachment, and being by him advised to do so, that course was pursued.

On these facts, the defendants asked the court to charge:

1. That if Welsh made the statement above set out to McCullough, and that thereon the attorney advised the suing out of the attachment, and that McCullough acted honestly on that advice, then they should find for the defendants, although the attorney was mistaken in law. This was refused.

2. That to enable the plaintiff to recover special damages,

he must show there was no probable cause for the attachment, and must also show he had sustained special damage in his credit by the transaction. This was given with the qualification that the jury must look to all the circumstances of the case, and from them determine whether the defendants proceeded without probable cause and vexatiously; and if they so found, and should also find that special damages had resulted to the plaintiff, then the case would be within the requisitions of the law.

3. That probable cause in this action did not depend on the actual state of the case in point of fact, but on the honest and reasonable belief of the party suing out the process; and if they believed that Welsh told McCullough as above stated, and McCullough honestly believing it to be true sued out the attachment, then they must find for the defendant. This was refused.

The plaintiff, in the course of the trial, offered a witness to prove that several of his neighbors were in Tuskegee on the day the attachment was issued. The defendants objected to this evidence, but it was allowed.

The defendants excepted to several rulings of the court, and now assigns these as grounds for reversal, and also the judgment sustaining the declaration.

JAS. E. BELSER and WM. P. CHILTON, for plaintiff in error, insisted:

1. The court erred, in permitting proof to be made, that several of the neighbors of the defendants in error, were in Tuskegee on the day the attachment was issued. Such proof was irrelevant and calculated to mislead the jury. [Powell v. Governor, 9 Ala. 36; Yarborough v. Moss, Ibid, 382; Ibid, 251.] The impression doubtless attempted to be created by such proof was, that the agent who sued out the attachment, ought to have inquired of them as to the condition, situation and intention of Walton, and that if he did not, his negligence should have enhanced the damages. Now if plaintiff in error had attempted to rebut such proof, it would open the door to endless litigation and difficulty. [Innerarity v. Byrne, 8 Porter, 176; Ibid, 511; 4 Ala. 40; 6 Ala. 407.] If irrelevant testimony be admitted, which could pre-

judice the party complaining, the court should reverse. [7 Ala. 379; 9 Ala. 251.]

2. It is doubtful, whether the other errors assigned, are covered by the case of *Alexander v. Hutchinson*, in our court, particularly the second charge, with the qualification. [9 Ala. 825.]

3. The demurrer to the declaration should have been sustained.

G. W. GUNN, for the defendants in error, made the following points:

1. There is no error in the judgment of the court upon the demurrer, neither is there any error in the charges of the court as given. [See *Kirksey v. Jones*, 7 Ala. 622; *Alexander v. Hutchinson*, 9 Ala. 825.]

2. The action being assimilated to case for malicious prosecution, any evidence conducing to show that the party suing out an attachment had all the means at hand to ascertain whether he could safely resort to the process of attachment, or which may show a criminal negligence on his part, is properly admissible; at all events the same was not so irrelevant as to have justified its exclusion. [1 A. K. Marsh, 3; 7 A. R. 622; *Bethea v. Taylor*, 3 S. 482; 9 P. 336.]

GOLDTHWAITE, J.—1. By referring to the statement of the case, it will be seen the attachment was sued out by one of the obligors in the bond as the agent of Madegan & Devon, and at their suit. The declaration alleges the attachment was wrongfully and vexatiously sued out by the defendants to this suit; and hence the question arises on the demurrer, whether these parties are answerable on the bond given by them, unless it is shown the attachment was wrongfully or vexatiously sued out by Madegan & Devon. Our statutes allow this process to be sued out by an agent, or attorney, as well as by the plaintiff in person, but in either event the cautionary bond is the same. Its condition is, that the *plaintiff* shall prosecute his attachment to effect, and pay the defendant all such costs and damages as he may sustain by the wrongful or vexatious suing out of the attachment. We think it very clear, that the object in requiring

this bond to be given was, to furnish the defendant in attachment with an adequate security against any costs or damages he should sustain from the wrongful or vexatious act of the plaintiff, and there is nothing in the terms of the bond, or of the enactment, which prescribes it, to indicate it was also intended as a security against the malicious act of the agent. In *Herndon v. Forney*, 4 Ala. Rep. 243, and *Hill v. Rushing*, Ib. 213, we had occasion to consider the subject of suits on these bonds to some extent; and in that last named, held, that whenever the injured party sued directly on the bond, instead of pursuing the plaintiff in attachment, by action on the case, the suit in all respects was governed by the rules applicable to that action. We do not question that a party injured by the unlawful or wrongful act of an agent, may have a direct action against the agent or his principal, but it is only as to the latter that the statutory bond stands as a security. This will be evident if we suppose several actions against the plaintiff and the agent, and after a recovery, the attempt to enforce the bond, on the ground that the judgment against the latter was unpaid. Again, suppose the agent acting maliciously, and the plaintiff in the attachment merely wrongfully, could it be asserted that he, or the obligors in the bond, were bound to answer the malicious act? The decision of this court in *Kirksey v. Jones*, 7 Ala. Rep. 622, contains a decisive answer to the last question. We there held, that a plaintiff in attachment was responsible for the actual damages sustained by the wrongful suing out of an attachment by an agent, and that he would not be responsible in any greater degree, if his agent was influenced by malicious motives. It is true, the case last cited, was the ordinary action on the case, but as the action on the statutory bond is governed by the same rules, the decision is entirely applicable to the case in hand. The decision made in *Alexander v. Hutchinson*, 9 Ala. Rep. 825, has no immediate bearing on the point we are now considering, as there, the plaintiff in the attachment sued it out in person, and we held, as in *Kirksey v. Jones*, that the mere belief in the existence of probable cause, was no justification for wrongfully suing out the process. It is obvious from what appears in this cause, that it is presented as if the act of the agent, in

suing out the attachment was the act intended to be litigated, and in this view we think the declaration is bad. The only questions which can arise in a suit on a bond like this, is whether the plaintiff wrongfully or vexatiously sued out this attachment.

If it was wrongfully sued out, then the plaintiff is responsible to the extent of the actual injury sustained, but if vexatiously also, the case is one for vindictive damages, only in the event that the plaintiff has wantonly or maliciously resorted to the process.

The result of our examination on this point is, the reversal of the judgment, but the cause will be remanded as the declaration can be amended. It also renders it unnecessary for us to examine the charges requested, or refused, as what we have said here, and in the other cases referred to, is supposed to be sufficient for the future guidance of the cause. The question in regard to the evidence admitted against the objection of defendants, is unimportant in the present condition of the case, and therefore we do not consider it.

TILTON v. RUSSELL.

1. An infant having no guardian and living with his mother, a widow, and going to a school in the neighborhood, will be presumed to be sent by her if the contrary is not shown.

Error to the County Court of Pickens.

HUNTINGTON, for plaintiff in error.

1. The court erred in taking the ground that the plaintiff in error must look to the administrator for the tuition of Mrs. Russell's son. An administrator is not bound for the support or education of the infant children of his intestate.

[Kent v. Stiles, 1 Penn. 358 ; Brewster v. Brewster, 8 Mass. 131.]

2. Education being a *necessary*, the defendant was liable to the plaintiff for furnishing it to her son ; at least, it was furnished with her knowledge and without her objection, the law therefore raises an implied assumpsit against her.

No counsel appeared for the defendant.

ORMOND, J.—The action was commenced before a justice of the peace, for a sum under twenty dollars, and carried by appeal to the county court. In that court, the facts, as shown by a bill of exceptions were, that a son of the defendant, a minor, went to school to the plaintiff in error two sessions, the tuition being worth eight dollars a session. The defendant was a widow, and her son resided with her, and had no guardian. There was an administrator of the estate of the father of the minor, but the estate had not been settled. There was no promise, or agreement, between plaintiff and defendant relative to the schooling of her son. Upon this state of facts, the court gave judgment for the defendant, and the plaintiff excepted.

We infer from the argument made in this court, that the court below decided in favor of the defendant, upon the ground that the administrator was liable for the schooling, and not the mother. It is clear that the administrator, as such, was not responsible for the tuition of the children of his intestate ; and it does not appear that he became bound individually for it. Although the defendant made no express contract with the plaintiff for the schooling of her son, she is nevertheless responsible if she sent her son to school, as the law will imply a promise to pay the value of the services of the schoolmaster. That she did send him to school, is, we think, the necessary inference from the facts stated in the record, as he resided with her at the time, and having no guardian, it must be presumed he was under her control and direction.

Let the judgment be reversed and the cause remanded.

HOOE v. HARRISON.

1. Where the father, a man of wealth, six or seven months after the marriage of his daughter, and when she and her husband were leaving the father's house to settle themselves in a distant State, delivered to the son-in-law sundry slaves, but fewer in number than his estate authorized to advance as a patrimony, it will be presumed that the delivery was intended as a gift to the son-in-law, and it devolves upon the father to show that they were intended as a loan or otherwise.
2. Where relief is sought in the case of a lost instrument as a guard upon the preliminary exercise of jurisdiction, an affidavit should be made that the instrument is lost and not in possession or power of the complainant; but to sustain the suit, if the loss is not admitted by the answer of the defendant, it is necessary that it be established at the hearing of the cause by competent and satisfactory proof; and the affidavit itself is not admissible.
3. Upon a bill by the father to recover of his son-in-law certain property upon the allegation that it was sent with his daughter as a loan, if the father fails to sustain his case, the bill will not be retained to inquire whether the issue of the daughter who is dead, has any interest in the property.

Writ of Error to the Court of Chancery sitting in Pickens.

THE case stated in the original and amended bills may be thus condensed: The defendant, Harrison, intermarried with the daughter of the complainant in 1831, in King George county, Virginia—all the parties at that time residing in that State. At the time of the marriage, the defendant was a man of limited means, and not long after, the complainant suggested to him the propriety of visiting the western country with the view of locating there and acting as his agent in selecting lands and establishing plantations, and as an inducement to his doing so, proposed to provide him the means of support and the necessary funds. The defendant consented to carry out the complainant's suggestions; thereupon the latter selected from his estate sixteen slaves, whose names, together with their increase, are stated in the pleadings; but not being disposed to part with the title to these slaves, the

complainant required the defendant to execute an instrument in the nature of a receipt for them as a loan, until such time as he should choose to reclaim them. This writing was accordingly executed by the defendant on or about the 10th of December, 1831, and expressed that he had received from the complainant the possession of the slaves, to hold as a loan until the latter should think proper to call for them. Complainant excuses the non-production of this paper by alledging that on or about the third day of December, 1834, it was in his trunk, which was stolen from a hotel at which he was sojourning in the city of Tuscaloosa; and after diligent inquiry and search, he has never been able to recover the trunk or any part of its contents.

Shortly after the execution of the receipt, the defendant left Virginia and began to make a settlement in the Choctaw country in the State of Alabama. In December, 1834, the defendant's wife died, and in 1840, from rumors which reached the complainant, he supposed that matters were not well managed, and gave certain instructions to another agent in respect to one of the slaves, which were not executed as complainant believes in consequence of defendant's opposition; thereupon complainant judged it prudent to visit the plantation occupied by the defendant. Various causes interposed to prevent the complainant from carrying out his purpose until the 15th of February, 1842, when to his great surprise the defendant refused to deliver to him the sixteen slaves with their increase, or in any manner account for them, although he had repeatedly and at all times previously admitted the complainant's title to them. Other allegations are made charging that the defendant was complainant's agent in the purchase of land, &c. but as there is no litigation in this cause in respect to them, they need not be here noticed.

The equity of the bill is rested upon the ground that certain facts charged are peculiarly within the defendant's knowledge, so that a discovery by him as to these, are necessary to enable the complainant to obtain the relief he seeks: *Further*, that most of the slaves in controversy were reared in his family, and the others were acquired under such circumstances as makes their possession very desirable; that an

equivalent in money would not compensate him for their loss, &c.

The bill prays that the defendant may be compelled to deliver up the sixteen slaves together with their increase, that he may be compelled to render an account in respect to their management, the amount of profits and crops made by them since they were demanded in 1842; that the lost receipt may be established, and trusts arising under the same be performed and carried into execution; and that such other relief as is appropriate be granted. An affidavit affirming the loss of the receipt as alledged, accompanies the bill.

Defendant answered the bill, admitting the marriage of himself and the complainant's daughter about the time alledged, and his removal from Virginia to Alabama in December, 1831. He admits that he received the sixteen slaves of the complainant, but insists that they were an advancement by the latter to his daughter—whether the complainant intended to retain the title to the slaves he does not know; for he said nothing to defendant on the subject.

Defendant admits that at the time he received the slaves, he signed a short memorandum or receipt written by the complainant; he cannot undertake to say what were the terms of the paper, but believes the object was not to affect defendant's title as between complainant and himself. He denies, according to recollection and belief, that it was such as complainant alleges; thinks that complainant believed that by means of the receipt he would be able to prevent a sacrifice of the slaves, if the defendant should be unfortunate, or he may have desired to have evidence of what he had advanced the defendant as the husband of his daughter.

It is not admitted that the receipt is lost, but insisted that proper proof of this fact may be made. The letters of complainant to defendant as early as March, 1832, and repeatedly since, speak of these slaves as the property of the latter; extracts from some of these letters are embodied in the answer to the original bill. Defendant denies that he received or held the slaves as a loan or otherwise for complainant's benefit; that the complainant did not within defendant's knowledge or belief set up a claim to them, or deny the defendant's title, until February, 1842.

Defendant denies that he came to the southwest to settle plantations, &c. as alledged by the complainant. He expresses the belief that if the complainant could obtain the value of the slaves, his feelings would not suffer by being deprived of them. He answers fully in respect to his agency for complainant in purchasing lands and other matters.

The cause was heard upon the bills, answers, exhibit and proofs; whereupon the chancellor was of opinion that the answer was a denial of the allegations of the bill, and that independent of the influence of the answer, the testimony in favor of the defendant's title clearly preponderated; and the bill was accordingly dismissed with costs.

B. F. PORTER, for the plaintiff in error, made the following points: 1. The proof of the existence and loss of the receipt was abundant. [10 Johns. Rep. 374; 16 Id. 193; 20 Id. 144; 4 Cow. Rep. 483; 9 Id. 208.] 2. The delivery was a mere loan, and not a gift or advancement. [2 Hen. & M. Rep. 289; 3 Yerg. Rep. 60; 1 Hill's Rep. S. C. 194; 1 Hill's Eq. Rep. 12; 4 How. Rep. (Miss.) 524.] 3. If the testimony does not show that the transaction was a loan, the defendant's admissions prove that it was a gift for his wife and child. Upon this hypothesis the estate should have been vested in the child, and not in the defendant; but by dismissing the bill, the defendant is made the beneficiary, and thus the donor's intention is defeated.

A. F. HOPKINS and E. W. PECK, for the defendant. The allegations that the slaves are family servants, &c. are not sufficient to give a court of chancery jurisdiction. [2 Stew. & P. Rep. 371; 3 Ala. Rep. 747.] If the receipt was lost, it furnished no ground for going into equity—an action at law could have been maintained, and the loss supplied by calling upon the defendant for a discovery. [1 Story's Eq. 99, 101, 103.] The affidavit of loss filed with the bill, was not evidence of the fact at the hearing, but the answer throws upon the complainant the *onus* of establishing it by competent proof. [1 Story's Eq. 104, 109; 9 Ves. R. 466.]

The original bill does not alledge the necessity of a discovery, and if it did, the answer furnishes a discovery by a

denial of all its allegations. The amended bill is a mere pretence to give the court jurisdiction and the answer to it, denies the facts stated in it. In this condition of the cause, the bill was properly dismissed. [1 Story's Eq. 90, 91.]

Upon the proof, the case is clearly against the complainant. He has failed to prove the existence and loss of such a receipt as he alleges the defendant executed for the sixteen negroes, though the establishment of both these facts are thrown on him by the answer. [1 Pet. Rep. 600.] In the absence of proof in cases like the present, the law presumes a gift. [4 McC. R. 251; 3 Id. 207, 506; 3 Hen. & M. Rep. 127; 7 Ala. R. 652.] But we are not left to presumptions for the evidence establishes a gift. The defendant's answer in a suit in Mississippi, was introduced by the complainant, and thus made available for both parties—this shows that the slaves were given as an advancement of the defendant's daughter. [2 Johns. Ch. Rep. 92; Gresley's Eq. Ev. 324; 1 Phil. Ev. C. & H. ed. 360.] In addition to this, complainant's letters to the defendant, and the depositions, show the same fact. As for the defendant's letters to complainant, they prove nothing adverse to his defence.

COLLIER, C. J.—In *Olds v. Powell*, 7 Ala. R. 652, it is said, "When property is sent home with a new married couple by the parents, it will be presumed to be a gift, unless at the time a less estate is declared or limited. Whether it be a gift, or mere loan, is a question of intention; any fact therefore which affords evidence of such intention, is admissible as part of the *res gesta*." [See also, 4 McC. Rep. 251; 16 Pick. Rep. 62; 2 Bay's Rep. 528; 3 Hen. & M. Rep. 127; 1 Hayw. Rep. 2; 2 Id. 66, 97.] In order to warrant the presumption of a gift in such case, it is not necessary that the property be sent to the residence of the married pair; it is enough if it be delivered to the husband, or suffered to go into their possession. [3 McC. Rep. 207, 506; 2 N. & McC. Rep. 93.] So property in a slave, permitted by parents to go into the possession of a daughter, on her marriage, vests in the husband of the daughter. [4 McC. R. 228.] In *Davis v. Webb*, 1 McC. Rep. 213, it was held, that where there was an acceptance and continued possession of property

which a parent permitted to go into the possession of his son or daughter, upon his or her marriage, it may, by lapse of time be construed into a gift, though originally declared to be a loan. And in *Keete v. Macey*, 4 Bibb Rep. 35, it was decided, that if a father deliver slaves to his son-in-law upon marriage, without avowing the purpose of the delivery, and the son-in-law retains possession for five years, it should be left to the jury to determine whether it was intended as a gift or a loan. [4 Bibb's Rep. 35. See also, 1 N. & McC. R. 221.]

In the case at bar, it is apparent from the proof, that the complainant was quite advanced in life, with but two children, and the prospect of no more, that he was the proprietor of a large estate—amply able to bestow bounty upon his daughter far beyond the value of the slaves in question; that the defendant and his wife spent the greater part of their time at the complainant's house, during the six or seven months they sojourned in Virginia after their marriage, and upon leaving the State the slaves were delivered by the complainant to the defendant, to be taken to the new home which the latter and wife proposed to make in the south west. These facts impose upon the complainant the necessity of repelling by proof the inference that the delivery was intended as a gift, and still retained the title to the slaves. This he proposed to do, proving that the defendant executed a writing acknowledging their receipt, and stipulating for their return. The defendant admits that he gave a receipt, but denies that its import was such as the complainant alledges; thus throwing upon the latter the *onus* of sustaining the allegation of his bill.

Where relief is sought in the cases of supposed lost instruments, it is said, that as a guard upon the preliminary exercise of jurisdiction, an affidavit of the loss of the instrument, and that it is not in the possession or power of the plaintiff, is indispensable to sustain the bill. But to maintain the suit it is necessary, if the loss is not admitted by the answer of the defendant, that it should be established at the hearing of the cause, by competent and satisfactory proof. [1 Story's Eq. § 88.] Here the defendant has not only denied, upon information and belief, that the receipt which he executed

was lost, but has proved that the complainant repeatedly spoke of it as in his possession, years after the alledged loss. To countervail the effect of the answer and this proof, the complainant adduced no other evidence than his preliminary affidavit, which the authority cited, shows, was inadmissible at the hearing.

Again: the testimony in the cause falls far short of establishing that the slaves were delivered as a loan, or that the complainant retained his right to them, or that the defendant stipulated for their redelivery on demand, or upon a contingency or otherwise. The extracts relied on from the defendant's letters do not contain an admission or acknowledgment, direct or indirect, that the slaves were the property of the complainant. These, as well as all the testimony are altogether consistent with an absolute property in the defendant. This being the case, it is clear that the complainant is not entitled to the relief which he seeks.

The defendant has not only denied by his answer every thing of which the complainant's right to recover may be predicated, but he has shown by the complainant's letters, and the testimony of several witnesses; repeated admissions that the slaves were his property—had been given to him by the complainant. It is unnecessary to consider more particularly the evidence on either side; for it is so explicit and uncontradictory in its essential points as not to require argument to illustrate it.

There is certainly nothing in the record from which it may be assumed, that the defendant's wife, during life, or the offspring of the marriage since her death, had a separate or exclusive interest in the slaves. If such a hypothesis be well founded, it may be quite enough to say that the bill was not framed with a view to secure the supposed interest of any one else than the complainant himself, and the dismissal of the bill cannot prejudice the rights of third persons.

We are relieved by the view taken, from the consideration of the question, whether, if the transaction brought before us was a loan, it would not, at this distant day, be presumed from complainant's acquiescence in the defendant's possession,

that he had abandoned his right to the slaves, and thus made it a gift. It is profitless to examine the objections to the equity of the bill, or any other point raised at the argument. We have but to add, that the decree is affirmed.

ARMSTRONG v. DARGAN & MAYS.

1. In proceeding against a garnishee after the rendition of a judgment *nisi*, two returns of *non est* to succeeding writs of *sci. fa.* will sustain a final judgment against him.

Writ of Error to the Circuit Court of Montgomery.

ARMSTRONG was summoned by garnishee process as the debtor of one Abercrombie, against whom Dargan & Mays, for the use of one Earle, had recovered a judgment, and failing to appear and answer in accordance with the summons, a judgment *ni si* was rendered against him for the amount of the judgment debt. Afterwards, two writs of *sci. fa.* were issued, the one after the other, returnable to succeeding terms, and both being returned *non est*, judgment final was rendered.

This is assigned as error.

ELMORE, for the plaintiff in error, insisted—1. That the statute contemplates a personal service of the *sci. fa.* and must be pursued. By the common law no *sci. fa.* was allowed in personal actions, (6 Bacon Ab. Sci. Fa. c. 104,) and the form of a writ being given by statute, the party cannot depart from it, although another remedy may be allowed than by the statute. [19 Viner's Ab. 503, § 4; Ib. 512, note to § 12, 13.] So, likewise, if new powers are conferred on a

court, and a course of proceeding prescribed, that must be pursued.

MAYS, contra, insisted a *sci. fa.* could be *executed* without personal service, and the statute using this term is not to be construed differently from any other giving a *sci. fa.* In general, two *nihils* upon *sci. fa.* are equivalent to personal service. [Elliot v. Mayfield, 3 Ala. Rep. 223; 6 Comyn's Digest, 460, 520; Tidd's Pract. 1039; 1 Cowen, 70; Kearns v. The State, 3 Blackf. 334; Cox v. McFenor, Breese, 10; 2 Wharton, 9.]

GOLDTHWAITE, J.—Our statute prescribing the course of proceeding against *garnishees*, directs that conditional judgments shall be rendered when they fail to appear, “upon which a *scire facias* shall issue against the garnishee returnable to the next term of the court, to show cause why final judgment should not be rendered against him, and upon such *sci. fa.* being duly executed and returned, if the garnishee shall fail to appear according to the mandate thereof, and discover, &c. the court shall confirm such judgment,” &c. [Dig. 59, § 20.] The question is, whether the execution of the *sci. fa.* here spoken of is a personal service on the garnishee, or whether it refers to the ordinary course of proceeding by that writ. Although the statute is not entirely clear, we think it must be intended to refer to the general course of practice peculiar to this writ, as otherwise we must presume the framer of the enactment ignorant of the rule which declares that two returns of *nihil* or *non est* is equivalent to execution of the process. There is strong reason to put this construction on the statute, as a subsequent enactment, providing for proceedings against a transferee of the debt owing by the garnishee, directs expressly that two notices returned not found shall in that case authorize the court to proceed. [Digest, 63, § 41.]

The general course of practice in writs of *sci. fa.* allowing two returns of *nihil* as equivalent to personal service, is recognized and admitted by all the cases, its origin is nowhere

very distinctly traced, though all the cases on the writ are collected by Mr. Williams in his notes to *Underhill v. Devereux*, 2 Saund. 67. This learned commentator admits that by force of this rule the intent of the law to give notice is wholly defeated, as the defendant may be summoned or not as the plaintiff pleases. [Ib. 72.] The mischiefs of the rule, however, are prevented or obviated by resort to *audita querela*, whether the defendant had a release acquittance or other matter which he might have pleaded to the *sci. fa.*; but he could not be relieved by writ of error. [Ib. Note w.] It is also said the court will interpose in a summary way when the application is secret, and the fact on which relief is sought is not disputed. [Ib.; see also *Mitford v. Gardwell*, 2 Strange, 1198.] Whether these modifications of the rule as stated have any application to the case of a garnishee who has once had the opportunity to answer, but has failed to do so, it is not our business now to inquire.

What we have said is sufficient to show the judgment is free from error.

It is scarcely necessary to add, that the statute construed by us in *Hayter v. The State*, 7 Porter, 156, is quite different from that we have just considered, and the decision there turned on the ground that personal service was expressly provided for.

Judgment affirmed.

COLLINS & Co. v. HYSLOP & SON.

1. It is sufficient if the memorandum of the style of the cause, made by the clerk, indicate with reasonable certainty to what suit it relates. The description of it by the firm name is sufficient, and the judgment in favor of the plaintiffs against the defendant,s is sufficient, as the pleadings show who they are.

Error to the Circuit Court of St. Clair.

MOTION for judgment *nunc pro tunc*. From the record it appears, that on the 13th March, 1839, a writ issued to take the bodies of Jesse A. Collins, and John Collins, merchants and partners, using the style J. A. Collins & Co., to answer Robert Hyslop, and William Irving Hyslop, merchants and partners, using the name and style of Robert Hyslop & Son, in a plea of trespass on the case, &c. Indorsed on the writ is an acknowledgment by both defendants, of service of the writ.

The declaration filed at the return term, pursues the writ in the description of the parties, and counts on a promissory note, to which the defendant appeared and pleaded, after which there appears in the record the following entry of judgment :

Robert Hyslop & Son,	}	This day came the plaintiffs by their counsel, and the defendants in their own proper person, and
vs.		
Jesse A. Collins & Co.		the said defendants in open court came forward, and confess-

es judgment in favor of the plaintiffs, in the sum of seventeen hundred and seventeen dollars and fifty-six cents, due by promissory note. It is therefore considered by the court, that the said plaintiffs recover of the said defendants the said sum of, &c. &c.

At the March term, 1846, on motion of the plaintiffs, the judgment was amended, so as to make it read, the said Robert Hyslop and the said William Irving Hyslop, merchants, &c. [recover of the said Jesse A. Collins, and the said John Collins, merchants and partners as aforesaid, the said sum, &c. &c.

The amendment of the judgment is the matter now assigned as error.

W. P. CHILTON, for plaintiff in error.

1. The court had no power to enter judgment *nunc pro tunc*, after the lapse of six years. The statute limits its power to three. [Clay's Dig. 322, § 55.]

2. As the statute by its express terms gives no power to make amendments after three years in judgments, does the court possess the power by the common law? I contend it does not, and the authorities are clear to this point. [Viner's Abr. 289, Amendment, A.; 1 Bacon's Abr. Jeofails and Amendment, A.; 1 Salk. 46; Same, 51; 8 Rep. 156, b; 157, a; Sale v. Crompton, 1 Wilson, 61; 1 Comyn, 603; Bingham on judgments, 72; 13 Law Lib. 30.] The case of Wilkinson v. Goldtwaite, 1 S. & P. 159, and Mays et al. v. Hassel, 4 Stew. & Por. 222, mistake the law on this point. True, the court in a subsequent case, (Brown v. Bartlett, 2 Ala. R. 29,) refer to the first case as approving it, yet the point did not arise in that cause, and in the case of Armstrong v. Robertson & Barnwell, 2 Ala. Rep. 164, 168, the court admit the doctrine for which I contend, and deduce their authority to make such amendments alone from the statutes of 1807, 1824. The common law only allowing amendments during the term, and our statutes extending the time to *three years after final judgment*, and there being no law or warrant for amending after three years, the judgment should be vacated.

3. But if I am not sustained in this view of the case, there is another ground on which I rely with confidence. The judgment entered in March, 1840, is by *confession*, in favor of Robert Hyslop & Son v. Jesse A. Collins & Co. It recites that the defendants came in their own proper persons, before the court, and confesses judgment in favor of the plaintiffs, in the sum of \$1,717 56, due by promissory note, &c. Now who came before the court? John Collins? The *record* nowhere says so. The judgment depends upon the confession, and not upon the papers. [Caller v. Denson, Minor, 19.]

S. F. RICE, for defendants in error.

1. "Every court must have the power to correct its own entries, so as to make them speak the truth of the case, even after the adjournment of the court, on sufficient evidence that an error of fact has been committed." [Coffey, use, &c. v. Wilson & Gunter, 2 Ala. Rep. 701; Scales v. Swan, 9 Port. Rep. 163; Smith v. Redus & wife, 9 Ala. Rep. 99.]

2. The lapse of less than ten years, will not prevent the

court from the exercise of its power to make amendments of its entries. And it is doubtful whether even the lapse of ten years will bar the exercise of such power, if the presumption of payment was repelled. [Wilkerson v Goldthwaite, 1 S. & P. 159.]

3. It is no objection to the amended judgment, that no execution had issued within a year and a day on the original judgment; nor is it matter of objection, that no notice is given to the opposite party. [Allen & Dean v. Bradford & Shotwell, 3 Ala. R. 281, and cases cited.]

ORMOND, J.—We are strongly inclined to the opinion that this judgment did not require amendment, and that the terms plaintiffs, and defendants, referred to the previous proceedings in the cause, the writ and declaration, and thereby became sufficiently certain to authorize an execution to issue thereon, in the name of, and against those indicated in the pleadings, as the plaintiffs and defendants. [The State Bank v. Smith, 5 Ala. R. 26.] It is no objection whatever, that the names of the parties are not set out at full length in the memorandum of the style of the cause, made by the clerk. It is sufficient if it indicates with reasonable certainty to what suit it relates, and in our opinion, such is the fact here, the description of the parties being by their firm name, or partnership designation.

But if this were not so, it cannot be doubted, that the writ and declaration, were sufficient to enable the court to amend the judgment by inserting, if necessary, the names of the plaintiffs and defendants at length. The cases referred to by the counsel for the defendant in error, are fully in point, and sustain the judgment of the court.

Judgment affirmed.

TAYLOR v. PAULLIN.

1. Where the testimony of a witness will have the effect to satisfy a judgment recovered against him by the plaintiff and defendant *jointly*, by making both of them liable for the payment of an account which he has against the plaintiff *individually*, he is an interested witness, and his testimony should be excluded if objected to.

Writ of Error to the Court of Chancery sitting in Barbour county.

THE bill was filed by the defendant in error, alledging that the plaintiff and defendant had been partners in keeping a house of entertainment, in Eufaula, that the partnership had been dissolved, and praying that an account be taken of the transactions of the concern, &c. Upon the hearing, it was ordered and adjudged that the master take an account, that he examine the parties on oath, and receive such other and legal proofs as may be offered, &c.; and that in taking such account, he make all proper and just allowances, &c.

From the report of the master, it appears that the items of account litigated before him, were, an account due the firm by the defendant, of \$30, for the clothing of three negroes, and an account of \$125 63, due the firm by the complainant. In respect to this latter item, it appeared to be an account against Edmund Sheppard, which Sheppard, being examined, stated he was unwilling to pay, because he had a medical account against the complainant, and an agreement had been made between himself and the parties to this suit, that the complainant should assume its payment. Prior to that agreement the witness had been sued on the account, and a judgment recovered against him—no execution has issued on that judgment nor has the witness any property from which it can be satisfied. Complainant objected before the master, that Shep-

pard was interested to fix a liability upon him, and moved to exclude his testimony; but the objection was overruled.

Upon an exception to the report, the chancellor was of opinion that Sheppard was an interested witness—that his testimony tended to establish his account as a set off against the debt which he owed the firm; and consequently sustained the exception—ordering the account to be retaken. [The master again reported according to the directions of the chancellor, and his report was confirmed.

J. E. BELSER and J. BUFORD, for the plaintiff in error, insisted, that Sheppard was neither a party or privy to the record, and had no such direct interest in the result as required the exclusion of his testimony. [1 Greenl. on Ev. 590; 1 Porter's Rep. 313; 7 Id. 466; 9 Id. 412; 9 Ala. R. 803.]

No counsel appeared for the defendant.

COLLIER, C. J.—The only question in this case is, was Sheppard a competent witness to establish the fact to which he was examined before the master. If we were authorized to infer from the report, that he was examined for the purpose of proving the justness of his account, and the amount of it, we should be inclined to think that he was an incompetent witness to establish these facts. But after the most careful consideration, we are constrained to conclude that there was no controversy upon these points, or that the account was proved by testimony to which no exception was taken.

Looking then to the report, and the opinion of the chancellor, as the only sources to which we are permitted to refer for information, we understand the testimony of the witness tended merely to show that the complainant agreed to assume the payment of the judgment which the firm had recovered against him, and that the account which he had against the complainant should be received in satisfaction. The witness affirms that both the parties assented to the arrangement, and it would seem that the defendant is still willing to abide by it. In this posture of the case, can it be

assumed that the witness had such an interest as rendered him incompetent?

A *joint* judgment in favor of the complainant and defendant was recovered against the witness, while the complainant was *individually* indebted to the witness in an open account. The judgment may be enforced by execution, but the account, if not voluntarily paid, can only be collected under a judgment yet to be recovered. If the testimony of the witness establishes the agreement in respect to which he testifies, then his account will be discharged; not with money, it is true, but by satisfying the judgment against him. Thus fixing by his testimony a liability to pay his account, upon two instead of one, and at the same time receiving payment from them, or rather effecting a set off which could not be otherwise made. It is clear that the witness has such an interest as renders him incompetent to prove the agreement. We lay out of view the present insolvency of the witness, and the record imparts no information in respect to the situation of the complainant; for whatever may be the condition of the respective parties, it can have no influence upon the question of *competency*—at most it would go to the credibility of the witness, if he was competent. Our conclusion is, that the chancellor did not err in the rejection of the testimony; and his decree is therefore affirmed.

GARY v. COLGIN.

1. Where a deed of trust was made by a debtor to a trustee to secure a creditor and sureties, the declaration by one of the sureties that the grantor made the deed to prevent his being compelled to pay a security debt, is not sufficient to enable a sheriff seizing the property, after its sale by the trustee to that surety, and a conveyance by him to another in trust for his

Gary v. Colgin.

creditors, to raise the question that the first deed is fraudulent as to the creditors of the grantor, in the absence of any other proof of fraud.

2. Where property is conveyed by deed of trust and sold by the trustee in a different manner than directed by the deed, a stranger to the deed cannot dispute the regularity of the sale, although the purchaser is guilty of fraudulent acts in connection with it, and has made no payment of the purchase money.

Writ of Error to the Circuit Court of Sumter.

TRESPASS by Colgin against Gary for taking and converting several slaves.

At the trial of this cause in the county court, (it being there brought,) the plaintiff made title to the slaves in controversy under a deed in trust executed by Edward B. Colgin to the plaintiff, for the benefit of certain creditors therein named. The defendant endeavored to justify under a *fi. fa.* in favor of Kissam & Co. v. Allen P. Binns. It was proved the slaves had been the property of Binns at a time previous to the rendition of the judgment of Kissam & Co. Binns made a deed of trust of all his property in trust to secure Edward B. Colgin and Charles H. Binns, who were bound as sureties for him. This deed stipulated that Binns should remain in possession until it became necessary for the trustee to take possession to close the trust. It was proved that the trustee in that deed went to the residence of Binns and exposed the property to public sale. Edward B. Colgin became the purchaser of the slaves in controversy, as well as of a number of others, by bidding them off. There was testimony conducing to show that Edward B. Colgin failed entirely to comply with the terms of the sale, and that no conveyance of the slaves was made by the trustee to him, and that they remained at the same place after the sale that they were at before it took place. They also remained at the same place up to the time of the seizure by the defendant as sheriff, but they were proved to be Edward B. Colgin's property after the sale, and acts of ownership by him were proved. There was evidence conducing to show that Edward B. Colgin, on the day of the sale, prevented or persuaded persons not to bid, and said after he purchased or bid them off that the pro-

perty of Binns would be able to pay all his own individual debts, and that the deed of trust was made for the purpose of preventing him from having to pay debts on which he was bound as surety for one Freeman.

The defendant's counsel asked the court to charge the jury, that if they believed the deed of trust made by Binns was made to delay or hinder creditors, it was void. The court said it felt some difficulty in giving the true rule. That a debtor had a right to prefer creditors, and he thereby frequently not only hindered, but entirely defeated those not preferred; and if the jury believed the debts preferred were just debts, and the deed was made to secure them, the deed was not void, although the grantor was induced to make it to prevent the recovery of the money due by him as surety for Freeman out of the effects of the grantor, unless such was the leading intention of the grantor.

It was further in evidence, that Edward B. Colgin promised the trustee on the day of sale to procure the obligations or debts of Binns secured in the trust deed on some short time, and that he failed to comply with this promise. The court was requested to charge the jury, that if by the terms of the trust the trustee was requested to sell for cash and he departed from those terms, the purchaser obtained no title.

Also that if Edward B. Colgin merely bid off the property, but paid nothing for it, and deceived the trustee, and the trustee made him no title and gave no receipt for the purchase money, that the title remained the same as before said sale, and that Edward B. Colgin acquired no title by the sale.

These charges were refused, and the jury was instructed that they could not inquire into or take advantage of those irregularities if they existed, but only the creditors whose claims were secured by the trust.

The defendant excepted, as well to the charges given as to the refusals to charge as requested, and the several rulings of the court were assigned as error in the circuit court, to which the cause was removed by writ of error. That court reversed the judgment, and the plaintiff now assigns this reversal as error.

S. W. INGE, for the plaintiff in error, made these points: .

1. The charges requested are entirely abstract, as there was nothing to show either that the deed from Binns was fraudulent, or that the defendant stood in the position to raise the question. All that is shown is, that Binns preferred certain creditors, and this he had the right to do. [Stover v. Herrington, 7 Ala. Rep. 193; Borland v. Mayo, 8 Ib. 118.]

2. But even if the deed was fraudulently made by Binns, the plaintiff is a *bona fide* purchaser without notice of the fraud or connection with it. [Cummings v. McCullough, 5 Ala. Rep. 338; Mallory v. Stodder, 6 Ib. 801; Horton v. Smith, 8 Ib. 73.]

3. The supposed irregularities in the sale by the trustee are matters between the trustee and *cestui què trust*, and no question of the kind can be raised by a stranger. [Brown v. Lipscomb, 9 Porter, 472.] Even if the sale by the trustee was fraudulent, those only affected by the fraud can complain. [Bozeman v. Draughan, 3 Stewart, 243; Dearman v. Radcliffe, 5 Ala. 195.]

R. H. SMITH, for the defendant in error, assigned :

1. That the plaintiff in the action claiming only as trustee of E. B. Colgin, he takes no other or better title than Colgin had, and does not occupy the position of an innocent purchaser. It therefore rests on him to show the fairness of the deed. [Smith v. Leavitt, 10 Ala. 92.]

2. The admissions of Colgin were good evidence to charge those claiming under him, as they were made after his purchase and when possessed of the property. [4 Ala. Rep. 40; 1 Ib. 344.] The intention of the parties in making the deed may be arrived at by their subsequent conduct or admissions. [10 Ala. R. 92.]

3. The first charge asked for is in the language of the statute of frauds, and the one given is clearly not the law.

4. The defendant, as sheriff, stood in the place of the creditor, and could not assert any defence against the deed that his principal could not assert; therefore, on the principle assumed by the court, the last charge was wrong.

GOLDTHWAITE, J.—1. If the evidence before the jury in this case, was of a nature proper to raise the question,

whether the deed made by Binns was for the purpose of delaying or hindering creditors, then it must be conceded the defendant was entitled to the charge requested by him on the general principle, however correct it would have been for the court to explain the principle in its application to the particular case. When however, the evidence set out in the bill of exceptions is looked to, we think it becomes apparent there was none to warrant the charge asked for. It will be remembered the plaintiff claimed under a conveyance from Colgin, who was the purchaser under a trust deed executed by Binns, as whose property the slaves were seized and sold. Now it is quite clear, the defendant may be allowed to justify his seizure, by showing that all these conveyances are invalid, by reason of fraud, as in that event no title would pass and the slaves remain the property of Binns, as which the defendant seized it. But it is equally clear, that if the slaves were conveyed to Inge, as the trustee to secure creditors, or sureties, *bona fide*, and for a valid consideration, before the lien of the execution attached, which the sheriff held at the time of seizure, there was no title in Binns which would justify a taking. The object of the defendant in asking the first charge, was to support the charge that all the conveyances were parts of a fraudulent and therefore inoperative contrivance. The evidence as set out must be presumed to show that the deed was on a valid consideration, or in other words, that debts were due to some preferred creditor, to whom the other Binns and Colgin were the grantor's sureties. It is not denied that a debtor may lawfully prefer one creditor to another, (*Stover v. Herrington*, 7 Ala. Rep. 193,) but the defence insists that the admission of Colgin, one of the beneficiaries in the deed, that it was made to prevent the property of the grantor from being sold to pay a debt for which he was surety for another, is evidence to warrant the jury in declaring the deed void. In our judgment, this admission, although it might be proper evidence to go to the jury, was not sufficient by itself to invalidate the deed, because, if the utmost effect is given it against the purchaser, it does not connect itself with either the preferred creditor or the other security of the grantor—both of whom are likewise

beneficiaries under the deed. In *Anderson v. Hooks*, 10 Ala. Rep. 704, we held, that the connection of a simulated creditor with one that was *bona fide*, as the beneficiaries in a deed of trust, did not avoid it, although in that case the intent of the grantor to defraud was entirely apparent. It will be seen, this case goes much beyond the one before us, and establishes, that a deed for the indemnity of sureties will not be avoided, though the grantor and some of the beneficiaries concur in the fraudulent intent. [See also, *Borland v. Mayo*, 8 Alabama Reports, 104, § 18.] We come therefore to the conclusion, that the defendant was not warranted in asking the charge referred to, and for this reason there is no error in the refusal. The charge actually given in response to the request, calls for no other remark, than that if conceded to be erroneous, which, however, we should very much doubt, it could not prejudice the party.

2. The other charge grew out of the refusal to charge as requested on the supposed irregularity of the trustee's sale, and the purchasers conduct in relation to it. In *Brown v. Lipscomb*, 9 Portor, 472, where a sale by a trustee was not in conformity with the power, we held this was a matter that could not be investigated by a stranger to the deed. To the same effect is *Foster v. Goree*, 5 Ala. Rep. 424. It is evident the purchaser under the trustee's sale, would not be allowed to defeat an action for the price on the ground that the power had not been complied with, nor would it be any defence to the trustee, in a suit by the beneficiaries of the deed, that he had parted with the property without receiving pay. Neither the defendant nor the creditor under whom he acted, have any interest in investigating the questions of regularity, for if the sale was invalid, the purchaser would be a bailee for the trustee, and as such entitled to his action for the unlawful seizure. [McBride v. Thompson, 8 Ala. Rep. 650.] Another reason why a stranger should not be permitted to defeat the possession acquired under an irregular, or even void sale, is, that the purchaser nor seller can dispute its validity, except in a direct suit to cancel the sale, for in no other mode could the parties be placed in the condition they were at the sale. [Wier v. Davis, 4 Ala. Rep. 442; Creagh

v. Savage, 9 Ala. Rep. 959; Costello & Keho v. Thompson, Ib. 937.

On the whole, we are unable to perceive any available error in the ruling of the county court; its judgment is therefore affirmed, and that of the circuit court reversed.

COLLIER, C. J.—Edward B. Colgin acquired no title to the property in question, either as against the trustee, the beneficiaries in the deed, or Binns; and it was clearly competent for the trustee to have exposed it to sale again, to subserve the purposes of the trust. This is clear from a mere statement of the fact that he did not comply with the terms on which he was permitted to bid it off, and has really paid nothing for it. He did not then occupy the situation as it respects the property of one who acquires the possession under a purchase fraudulent as to the creditors of the vendor. A derivative purchaser from such fraudulent vendee, who becomes such *bona fide*, and for a valuable consideration, previous to the attaching of the liens of creditors, obtains a paramount title. There the first vendor might have made a fair sale of the property, and one who has acquired all his estate, though by a fraudulent purchase, stands in the same predicament with him, and may make a similar disposition of it. Here the trustee has no power to compromise the interests of his grantor or *cestuis que trust*—he cannot give away the property, either undisguisedly or under the semblance of a sale, for which no equivalent is asked or received. The proof negatives the idea that a gift was intended, but shows that E. B. C. failed to pay the purchase money. I have said that under the circumstances, this prevented him from acquiring any title whatever; and having no title himself, he could transmit none to a third person.

We have repeatedly held, that one who has right to a chattel seized under a *feri facias*, cannot interpose a claim of property under the statute, and prevent a sale by proving that a third person has a title, which, if asserted, would defeat the execution. The claimant himself must have either a general or special property, which would entitle him to maintain an action at law. In the present case, he has shown none, and it follows that the third charge prayed should have

been given. I forbear to consider the questions raised upon the statute of frauds, and have only to add, that I dissent from the judgment just pronounced.

PARKER AND WIFE v. MCGAHA, ADM'R.

1. Advances made to the widow and children by an administrator, cannot be admitted as a credit to him on the settlement of his administration accounts.
2. An administrator is chargeable with interest, from the time money of the estate comes to his hands, unless he makes oath that he has not used the funds, and if he does, it may be controverted, and an issue made up to try the fact.

Error to the Orphans' Court of Coosa.

UPON the final settlement of the estate, the administrator presented as a credit, a claim against the estate of \$400, for board and provisions furnished the widow and her family, an account for money paid for pork, corn and bacon, and an account for \$35, articles purchased by the widow at the sale. To the allowance of these items as a credit, the plaintiffs in error excepted; also to the allowance of an item of \$18, which is put down in the account as witness' fees; and further objected to the mode by which the interest was computed against him, the account showing assets received by him amounting to \$739 62, upon which interest is charged for one year on \$150, and for three years on \$100 33. The court allowed these items to be placed to the credit of the administrator, and computed the interest as above stated, and this is the matter now assigned as error.

MORRIS, for plaintiff in error:

1. The case of Willis, adm'r, v. the Heirs of Willis, is relied on to reverse this judgment.

2. The administrator is chargeable with interest from a period allowing a reasonable time for the collection of the debts due his intestate.

3. If he has charges against the distributees as guardian, he should present them in such character; he cannot blend them with the accounts settled as administrator. [9 Ala. R. 330.]

F. W. BOWDON, contra:

1. The record is silent as to the manner in which defendant kept or used the money of the intestate. If under the circumstances, the defendant was liable for interest, it is presumable the facts would have been spread upon the record. It cannot be assumed as a legal conclusion, that under all circumstances an administrator is chargeable with interest. The court will presume, in the absence of any thing of record to the contrary, that the defendant made the oath required by law, or showed a state of case in which interest is not chargeable. [Clay's Dig. 198, § 28; 2 Williams on Ex'rs, 1132.]

2. An executor is entitled to a reasonable allowance for costs and charges properly incurred in litigation pertaining to the estate committed to him. [8 Porter, 565; 6 Greenl. 48; 6 Hals. 44.]

ORMOND, J.—The allowance to the administrator of the items charged for board and provisions furnished the widow and children, and for money paid for pork, corn and bacon, for the use of the family of the intestate, were wholly unauthorized upon this settlement. Whatever claims the administrator may have against the widow and children, for money or other articles furnished them during his administration, he cannot bring it in as a credit in his account as administrator. Such a blending of his accounts as administrator, and *quasi* guardian, would produce such confusion as to render it impossible to ascertain the share of the several distributees. [Willis v. Willis, 9 Ala. 330.] So also the charge of \$35 for articles purchased by the widow at the sale, which so far

from being an item of credit, should have been included in the items of charge of the sale of his intestate's effects.

We cannot say from the record whether the charge of \$18 for witness fees was correct or not. It is obvious such a charge might be correct, and as it is not shown to have been improperly allowed, we must presume in favor of the correct action of the orphans' court.

The mode by which the interest was charged against the administrator on the amounts received is wholly unwarranted, by any thing appearing in the record. Our statute requires the orphans' court, in settling with an administrator, to charge him with interest from the time the money comes to his hands, unless he expressly denies upon oath that he has used the funds, and when he does so deny it, those interested in the estate may controvert the statement, and have an issue made up to try the fact. [Clay's Dig. 198, § 28.] No such denial appears in this case, and by reference to the inventory it is shown, that \$600 admitted in the account to have been received, was due the 1st January, 1836, and yet upon a settlement made nearly ten years afterwards, the whole amount of interest charged is \$36 10. The administrator will also be entitled to interest on all sums disbursed by him, see this question considered in *Brazeale v. Brazeale*, 9 Ala. 491.

The decree of the orphans' court must be reversed, and the cause remanded for further proceedings.

SAWYER'S ADM'R v. PATTERSON.

1. It is not necessary to fill up a blank indorsement by inserting the plaintiff's name, although the declaration describes him as an indorsee.
2. Where a note loses its assignable quality by a judgment having been recovered thereon against one of the makers, in the name of the assignee, the insertion of the name of another person in the indorsement of the payee which was previously blank, is a nugatory act, and the name thus

inserted may be stricken out at the trial of a suit brought by the assignee against another maker.

3. A *gratuitous* indulgence given by the plaintiff to the principal after the recovery of a judgment against him, will not discharge the surety.
4. The act of 1837, which inhibits the assignment of a promissory note by delivery merely, so as to permit the assignee to maintain an action thereon as the bearer, cannot be extended by construction to *blank indorsements*, or to an indorsement which directs the contents to be paid to the bearer, without indicating him by name.
5. Under a declaration which describes a note for the payment of a sum of money at an appointed day, it is not allowable to give in evidence, a note which conforms to the description in the declaration, and contains the additional stipulation to pay "interest from the date."
6. Where the defendant objects *separally*, to the admissibility of the note and its indorsement, on which the action is founded, if either the note or indorsement are inadmissible, the objection should not be overruled, because no cause is particularized; but where a general objection is made to written evidence, and the party objecting refuses to specify, or states one that is insufficient, then perhaps an appellate tribunal would not reverse the judgment, though a valid objection might have been stated in the court below.

Writ of Error to the Circuit Court of Talladega.

THIS was an action of assumpsit at the suit of the defendant in error, as the assignee of a promissory note, made by the intestate and one Drury Sawyer, (who is not sued,) on the 25th April, 1838, for the payment of the sum of \$800 to Robert C. Wilson on the 25th December, 1838. The cause was tried on the pleas of *non-assumpsit*, payment, and set-off. Upon the trial, the plaintiff excepted to the ruling of the court, and a bill of exceptions was sealed which presents the following points: 1. The plaintiff read to the jury the note, on which was an indorsement in these words: "Pay the bearer, Joseph H. Bradford. May 24th, 1838. R. C. Wilson." To the introduction of the note and indorsement, the defendant objected; the plaintiff's attorney thereupon struck out the name of Bradford, and then proposed to read the note to the jury—having proved that he inserted it several years previously, for the purpose of using the note as evidence in a suit then brought thereon in favor of Bradford, as

indorsee. The defendant again objected severally to the admission of the verbal evidence and the note and indorsement, but his objection was overruled and the evidence allowed to go to the jury.

2. On the part of the defendant it was proved that on the 15th July, 1839, a judgment for \$837 33, with \$6 50 costs, was rendered on the note declared on, in favor of plaintiff against Drury Sawyer—there being an indorsement in blank by R. C. Wilson, the payee. A *fi. fa.* issued on that judgment the 6th August, 1839, and was placed in the hands of the sheriff of Talladega. The intestate was then living, and resided near the defendant in the execution. A levy was made on a town lot worth about \$190, and Sawyer at the same time had a stock of dry goods and groceries in the county worth from \$1000 to \$1500; the *fi. fa.* mentioned was the only one in the sheriff's hands against him. On the 10th January, 1840, the sheriff made the following return: "This *fi. fa.* is delayed by the plaintiff until further orders." Shortly after the levy was made, Bradford informed the sheriff that the defendant in execution had paid him \$400 which was to be credited thereon, and that he had promised the defendant and wished the sheriff to delay or hold up the execution until further orders, but did not desire it so indorsed as to lose his lien. Under these instructions from Bradford, the sheriff made the return stated above, and Bradford, who had the right to control the execution, thus prevented the money from being made thereon. In addition to the \$400, D. S. paid B. \$75 on the judgment.

Upon a judgment and execution of a subsequent date in favor of another plaintiff, the property of D. Sawyer was sold in the spring of 1840, in Talladega, for about \$500. In the early part of 1840, D. Sawyer left this State wholly insolvent, and has not since returned—the intestate was his surety in the note, and in the latter part of 1839 owed him something, but how much, does not appear.

The note in question was indorsed by the payee to one Yarborough, in blank, and this indorsement was afterwards filled up. Plaintiff was the holder of the note when the suit was brought, which resulted in a judgment against Drury

Sawyer. Previous to the rendition of that judgment, the plaintiff transferred his right to the proceeds of the note to one Brown and J. H. Bradford.

The defendant prayed the court to charge the jury, that if they believed all the evidence adduced, they should find for the defendant; this prayer was denied, and the jury instructed, that if they believed all the evidence, the plaintiff was entitled to recover.

The defendant further prayed the court to charge, that if the note was indorsed specially, as had been proved, to Bradford, and the plaintiff had no interest therein at the commencement of this suit, then he was not entitled to recover. Another charge was prayed, in which the defendant condenses all the testimony, except that relating to the indorsement, and asks that the jury may be instructed, if they believe it all to be true, to find for the defendant. Both these charges were refused. A verdict was returned for plaintiff, and judgment was thereupon rendered.

S. F. RICE, for the plaintiff in error, cited 1 Johns. Rep. 143; 1 Ala. Rep. 468; 4 Id. 571; 6 Id. 461; Minor's Rep. 357; 3 Stewt. Rep. 271; 2 Port. Rep. 308; 9 Id. 306; Chit. on Bills, 100 to 107; Story on Prom. Notes, § 138, 139; 4 D. & E. Rep. 28; Doug. Rep. 611; 7 Mass. Rep. 480; 5 Wend. Rep. 307; Theob. on Prin. & S. 143; 2 Swanst. R. 185; 6 Blackf. Rep. 127.

W. P. CHILTON, for the defendant, cited 1 Marsh. R. 555; 4 Ala. Rep. 222-282; 6 Id. 572-532; 8 Id. 628-868-948; 9 Id. 198-586-847; 2 Port. Rep. 542; 8 Id. 307; 4 Pick. R. 307-385; 3 Mass. Rep. 274; 11 Mass. Rep. 288; 15 Id. 436; 1 Ala. Rep. 468; 2 Bail. Rep. 617; 8 Ala. Rep. 589.

COLLIER, C. J.—In *Riggs v. Andrews & Co.* 8 Ala. R. 628, it was held to be unnecessary to fill up a blank indorsement, even when the description in the declaration is, that the note was indorsed to the plaintiff. And in *Pitts v. Keyser*, 1 Stewt. Rep. 154, it was decided that where the plaintiff produces a note payable to himself, he is presumed to be

the owner of it, though it appears to have been indorsed by him to another person.

The cause in which Bradford recovered a judgment against the intestate, upon the note on which the present action is brought, was before this court at a previous term. [6 Ala. Rep. 572.] We there said "that after a judgment by Patterson as assignee of Wilson, the payee, against D. Sawyer, the principal, the note was assigned by Wilson to the defendant in error, who again put the note in suit against the plaintiff in error, the other party to the note not sued in the first action. In *Brown v. Foster*, 3 Ala. Rep. 284, we held that by the judgment in favor of the first assignee, the note had lost its negotiable quality, and could not be again transferred, so as to enable the transferee to sue in his own name." And thereupon the court reversed the judgment. These citations are quite sufficient to show that the note lost its assignable quality previous to the insertion of Bradford's name in the indorsement. Its insertion was a mere nugatory act, and striking it out did not in any manner affect the validity of the note, or the liability of the defendants to pay it. The legal title to the paper was in the plaintiff, and his striking out the name of Bradford, the written evidence, when coupled with the possession, indicated his right without inserting his own name. This conclusion is the necessary result of previous decisions, and requires no further argument to support it.

In *Sawyer v. Bradford*, *supra*, it was said, that "the direction to the sheriff to stay the execution was without consideration, and might have been countermanded at any time. It did not therefore interpose any obstacle to the payment of the debt by the surety, and when he could have proceeded against his principal." And in *Caller v. Vivian, et al.* 8 Ala. Rep. 903, we held that there was no obligation to active diligence on the part of a creditor in the collection of his debt—he may forbear the employment of coercive measures as long as he pleases. True, the discharge of a regular levy may be productive of injury to the surety, and so in most cases would be the dismissal of a suit, or the neglect to commence one, yet, unless the holder of a security by valid contract give day to the principal, the surety is not discharged. [See

also 4 Port. Rep. 61; 8 Id. 108; 8 Ala. Rep. 759.] These decisions show, that the mere gratuitous indulgence of D. Sawyer by the plaintiff, in directing the sheriff not to proceed on his execution, did not discharge the intestate from liability on the note.

The act of 1837, (Clay's Dig. 326, § 76,) which has been cited for the plaintiff in error, has no application to the case at bar. That enactment provides that all notes, bonds or bills payable to any person or bearer, or to bearer only, shall be sued in the name of the person only, to whom the same may be expressly made payable, and no one else but the payee or his indorsee or personal representative shall maintain an action thereon. The title of the act perhaps indicates its purpose, though its scope and operation may be still more extensive. But it is needless to say more on this point, as it is most obvious from the terms employed, that it does not extend to blank indorsements, or where the indorser directs the contents of assignable or negotiable paper to be paid to the bearer, without indicating him by name.

If the note itself was admissible under the declaration, what we have said will suffice to show that there is no error in the charge given or in those denied. The remaining question then to be considered is, whether the variance of the note offered in evidence from that described in the declaration, is such as required its exclusion. The declaration describes a note for \$800, dated the 25th April, 1838, and payable on the 25th December next thereafter, while that set out in the bill of exceptions as having been laid before the jury is for the same amount, dated and payable at the same time "with interest from the date." This, in our judgment, is a clear variance. The effect of the note declared on, is to draw interest after its maturity, if the makers failed to pay it—but interest on the note produced will be calculated not merely as a consequence of default in its payment, but in virtue of the express contract from the day it purports to have been made.

It is however insisted for the defendant in error, that as it does not appear the variance was expressly pointed out in the objection to the admission of the note, it should not be noticed in this court. The bill of exceptions distinctly states

that the defendant objected severally to the admission of the note and indorsement. If the court did not perceive the objection to the note, or it was not particularized, it should not have been overruled *in limine*, as it was well taken. Where counsel make a general objection to the admission of written evidence, and refuse to specify it when required by the court, or state one that is insufficient, then perhaps an appellate court would not give to the party the benefit of it, although he might have shown such a discrepancy between the proof and allegation as should have induced the court to allow his objection.

For the error in the last point considered, the judgment is reversed and the cause remanded.

ULRICK, ET AL. V. RAGAN.

1. When the declaration describes a writing as made by the defendants, *partners, under the firm, &c. of G. N. U. & Co.* it is not supported by producing a writing signed G. N. U. only, although the work for which the promise was made is in the same writing agreed to be done for *Doct. U. & Co.*

Writ of Error to the Circuit Court of Tallapoosa.

ASSUMPSIT, by Ragan, against Ulrick, Scott, Hopper, and Reidler, as partners, under the firm of G. N. Ulrick & Co. One count of the declaration sets out that the defendants by a certain contract in writing, agreed with the plaintiff, that if he should execute certain work in a certain manner, they would pay him a certain price. Another count is for work and labor, &c.

At the trial, the plaintiff read in evidence a writing in these words, to wit :

Know all men by these presents, that I, Wm. P. Ragan, hath this day agreed to build a cistern three hundred feet long for Doct. Ulrick & Co. at their mill, to convey the water from their dam to the mill house. The cistern to be about eight feet wide, six feet high, to be planked as high as necessary, and to be done in a workmanlike manner; and the above company is to furnish all the materials at the place—and for and in consideration of the above work, the said Ulrick has agreed to pay the said Ragan \$222. This is signed by G. A. Ulrick and W. P. Ragan.

On this evidence, the defendants requested the court to charge, that the plaintiff was not entitled to recover on the special count.

This was refused, and the refusal is now assigned as error.

CHILTON, for the plaintiff in error, insisted, the contract was individual to Ulrick, and the firm not bound by it. [Story on Prom. Notes, § 34, 35; Story on Bills, § 53; 11 Mass. 29; *Lazarus v. Shearer*, 2 Ala. Rep. 718; 10 Wend. 271; *Chitty on Bills*, 22.]

FALKNER and S. F. RICE, contra, cited, *Lazarus v. Shearer*, 2 Ala. Rep. 718; *Deshler v. Guy*, 5 Ib. 186.] The special count should have been denied on oath. [*Minge v. Curry*, 5 Ala. Rep. 168; *Alston v. Heartman*, 2 Ib. 699; Story on Prom. Notes, 38; do. on Bills, 66.]

GOLDTHWAITE, J.—1. The decisions made by us in *Lazarus v. Shearer*, 2 Ala. Rep. 718, and *Deshler v. Guy*, 5 Ib. 186, have no influence on this case, for the reason that no attempt is made here to plead the writing offered in evidence. If the special count had set out the instrument, and averred it was made by the defendants under the name of G. N. Ulrick, then, under those decisions, as well as that of *Fowlkes v. Baldwin*, 5 Ala. Rep. 705, it is quite probable they would have been concluded, unless the execution by them, in law as well as in fact, had been denied by oath. But nothing more is stated in the special count, than a written contract

by the defendants, as partners under the firm name of G. N. Ulrick & Co. The writing in evidence is *prima facie* that of G. N. Ulrick, alone. It is difficult to suppose a more obvious instance of variance. See in connection with the subject, *Stackpole v. Arnold*, 11 Mass. 27; *Prontz v. Stanton*, 10 Wend. 272; *Emby v. Lye*, 15 East, 7; *U. S. Bank v. Binney*, 5 Mason, 176; *Ethridge v. Binney*, 9 Pick. 272.

In our judgment, the court should have given the instructions asked for.

Judgment reversed, and cause remanded.

REYNOLDS v. DOTHARD, ET AL.

1. A ratification of the act of one professing to act as agent, with knowledge of the facts, has the same effect as if the agent had been fully authorized to act, especially in a case where the person to be affected, was not privy to the act of the supposed agent.
2. Chancery will not interfere, when injustice would be done to an innocent person.
3. The answer of one partner, on behalf of the firm, is sufficient, where the members of the firm are not charged with personal knowledge of the facts.

Error to the Chancery Court of Talladega.

THE bill was filed by the plaintiff in error, and states, in substance, that T. & W. Dothard recovered before a justice of the peace of Randolph county, four judgments for \$50 each, against one Weir, and one Adrian, from which an appeal was prayed by Weir, to the next county court of Randolph, and a bond executed in the penal sum of \$455, conditioned to prosecute an appeal on the judgments so obtained, to which the name of the plaintiff in error was signed, without his knowledge, or consent. That he never saw the bond

until after the rendition of a judgment upon it against him in the county court, as surety for the appeal, and that he did not execute it, or authorize any one, either verbally or in writing, to execute it in his name, and that it is a base forgery. That Adrian, a party to the notes, has property sufficient to satisfy the judgment, but that the sheriff is about to levy and sell his property to satisfy it. Weir having absconded, &c. An injunction was decreed according to the prayer of the bill.

Thomas Dothard, one of the firm of T. & W. Dothard, answered the bill, and as to the material allegation of the forgery of complainant's name, denies all knowledge of the facts, but states his belief, and charges, that Weir had full authority to sign the name of complainant to the appeal bond.

Adrian also answers, and states that he was merely the surety of Weir. He denies all knowledge of the alleged forgery, but states his belief from information, that if Weir did sign the name of complainant to the bond, he was authorized to do so; and that Weir, when he left the State, placed funds in the complainant's hands to satisfy the judgment.

Judgments *pro confesso* were taken against the other defendants.

The testimony which was taken in the cause is sufficiently noticed in the opinion of the court.

The cause coming on to be heard before the chancellor, on bill, answers; and proof, he considered that the evidence established a parol authority to Weir to execute the bond in his name, a subsequent ratification of it by him, and also that Weir had placed funds in his hands to discharge the judgment, and decreed that he should be compelled in equity to confirm, and give validity to the appeal bond, and dismissed the bill.

An appeal is prosecuted from this decree to this court, and is now assigned as error.

L. E. PARSONS, for plaintiff in error, contended, that T. Dothard answered separately, and not for the firm. That the judgment *pro confesso* against the other partner, was an

admission of the allegations of the bill, which bound the firm. [Hutchings v. Childress & Baker, 4 Stew. & P. 44; Gow. on P. 211.]

The evidence only proves a subsequent parol admission that Weir had authority to sign his name, but had exceeded his authority. A delegated authority must be strictly pursued. [Fisher v. Johnson & Campbell, 9 Porter, 210.]

An authority to do an act under seal, must be conferred by an instrument of the same dignity. [Story on Agency, § 49; Harrison v. Jackson, 7 T. R. 203; 2 Pick. 345; 5 Mass. 11; 5 Humph. 37; 1 Yerger, 26; 1 Wend. 424; 9 Id. 54, 68; 12 Id. 525; 6 G. & J. 254.]

He contended there was a plain distinction between this case and that of Gibbs & Labuzan v. Frost & Dickinson, 4 Ala. R. 720, as there the authority was not to execute, but to fill a blank in a bond.

S. F. RICE, contra.

1. A parol authority to execute an appeal bond is sufficient, if the bond be executed before the authority is revoked.— [Gibbs & Labuzan v. Frost & Dickinson, 4 Ala. R. 720.]

2. If such parol authority is not sufficient, yet if under it the bond be executed, and the party giving the authority has notice of it, and goes on to take full indemnity against the bond, such party is thereby estopped or precluded from asserting that he is not liable on the bond. [Chilton & Price v. Robbins & Painter, 4 Ala. R. 223.]

3. The fact that such bond was made for a larger sum than such party expected when he first gave the verbal authority, can make no difference; especially when, with notice of its execution, he takes full indemnity. [Roberts v. Adams, 8 Porter, 297; Herbert v. Huie, 1 Ala. R. 18; May v. Nabors, 6 Ala. R. 24.]

4. If such parol authority is not binding, yet when the party who has given it, becomes an actor in a court of chancery, that court will not relieve him, unless he first does justice and equity. It will not help to avoid his liability, on a mere *technical rule of law*, when it is manifest that by so doing, the court is in fact enabling him to do injustice to just creditors. But in such case the court will “*compel the prin-*

principal to confirm and give validity to the deed." [Story on Agency, § 49.]

5. There is a fatal variance between the proof and the allegations of the bill, as to the amount of the judgment, &c.

ORMOND, J.—We shall not inquire whether a parol authority would be sufficient in any case to authorize the execution by an agent of a bond in the name of his principal, because in this case there was a ratification by the principal, of the act after it was done, with full knowledge of all the facts. The effect of such ratification is, in general, an admission that the agent had the necessary power to do the act. Much more so should this be the rule when, as in this case, those to be affected by it, are not in any manner connected with the act of the agent, or affected with knowledge of his want of authority. The consequence to them, is precisely the same as if the agent had been legally authorized to execute the bond. Their debt has been jeopardized, precisely as it would have been if the plaintiff had executed the bond in person, and this consequence has resulted, not from any trust reposed by them in the agent, but by the conduct of the plaintiff and his agent, for such he was, though informally authorized to act for him. In such a case, a ratification of the act, when done, with full knowledge of the facts, should have the same effect as if the agent had been duly authorized in the first instance.

But there are other considerations of an equitable nature, arising out of the proofs, equally, if not more conclusive against the relief sought by the bill. It appears that the plaintiff had received from Weir, the debtor, a sufficiency of property to discharge the debt, and that with these means in his hands, he solicited indulgence, and promised to pay the judgment; and that Weir, the debtor, has absconded. Under such circumstances, he cannot ask a court of chancery to interpose, and relieve him from the payment of a judgment, which is in force against him, and which in equity and conscience he is bound to discharge. To aid him in this, would be to become accessory to the commission by him of a fraud,

both on Weir and the judgment creditor, and the bill was correctly dismissed for this reason, if no other.

The rule is, that one partner may answer for the firm, and as it is not alledged that the facts were within the knowledge of the defendants, the implied admission from the judgment *pro confesso*, against one partner, would not dispense with proof of the facts upon which the equity depended, if it were admitted that in any case, the answer of one member of a firm, would not enure to the benefit of the firm. In addition, the defendant, Adrian, the surety of Weir, has the same interest in the controversy that the Dothards have, and he has answered the bill, and put in issue the facts upon which the relief is sought. Our conclusion upon the whole case is, that the decree must be affirmed.

IVEY v. PHIFER.

1. The act of 1807 declares void all promises, &c. by which parties stipulate to pay to each other, money or other thing of value upon the event of a horse race, or other description of gaming; consequently, where money thus wagered is deposited with a stakeholder, it may be reclaimed by either party before it is paid over, by a notice not to pay it; and it is not necessary to entitle the party giving notice to maintain an action against a stakeholder, where the latter afterwards paid it to the supposed winner.
2. No particular form of words is necessary to inform a stakeholder, that a party depositing money in his hands as a wager, objects to its payment to the supposed winner; any words expressive of a prohibition to pay, *absolutely or conditionally*, are sufficient to revoke the authority of the stakeholder to pay under any circumstances, or until the condition is performed.
3. Where a party prays a charge appropriate to the evidence and conformable to law, it should be given, and its refusal cannot be excused by giving other charges of equivalent import.
4. The jury are the judges of what facts are proved, yet it is competent for the court to charge hypothetically, or to say what the evidence establishes, if they find it to be true.

Writ of Error to the Circuit Court of Lowndes.

THE plaintiff declared against the defendant in assumpsit, for money had and received, &c. The cause was tried by a jury, and the plaintiff excepted to the ruling of the court. From a bill of exceptions sealed at the instance of the plaintiff, it appears that the plaintiff had laid a wager of \$250 with one Vance, on the result of a horse race, and that he had deposited that sum with the defendant as a stakeholder; that three persons were selected as judges, and the race was run; that two of the judges decided Vance was the winner. Three witnesses testified on the part of the plaintiff, that shortly after the race was run, the defendant, in the presence of Vance, asked if he, plaintiff, objected to the payment of the money to the latter; to which the plaintiff replied, if all the judges have determined against me, then pay over the money, but I have understood that one of the judges has refused to decide against me; thereupon the defendant paid over the money.

Vance being examined at defendant's instance, testified that the defendant paid him the money in the presence of the plaintiff, and by his permission. Four witnesses testified that the plaintiff said the judges were gentlemen—he would not dispute what they did, and if they decided against him, Vance should have the money.

Plaintiff proposed to prove, that according to the rules by which the race was governed, unfair running and riding was to produce a forfeiture of the money bet; and that there was unfair running and riding; but this evidence was rejected by the court, and thereupon the plaintiff excepted.

The plaintiff prayed the court to charge the jury—1. The defendant could not rightly pay over the money to Vance on other terms than those prescribed by the plaintiff when he received it, or in virtue of some new authority; and that he was to prove that it was thus payed over. 2. If the defendant received the money to be paid over on the result of a horse race, to be run over a particular course, and under certain rules, he was bound to show that these rules were complied with, in order to justify the payment, or show some

new authority from plaintiff for that purpose. 3. If the money was to be paid over, *provided* it was fairly lost, then to justify the payment it should be shown to have been fairly won. 4. If the plaintiff said to the defendant before he paid over the money, "*provided all the judges* have decided against me, then pay over the money," unless all the judges had so decided, the defendant was not authorized to part with it. 5. If the plaintiff said to the defendant, while the money was in the hands of the latter, "*provided all the judges* have decided against me, pay over the money, but I am informed one of the judges has not so decided," and the defendant paid over the money, though one of the judges had not decided against him, then the payment was made by the defendant in his own wrong, and the plaintiff was entitled to recover. 6. If the defendant, understanding there was a controversy about the decision, and plaintiff's objection was made known to him while the money was in his hands, notwithstanding which he paid it over, then the payment was in his own wrong, and the plaintiff was entitled to recover.

These several charges were refused—the first, second and third on the ground that they were abstract. There was no proof of notice to the defendant not to pay over the money to the winner, unless it could be implied from the evidence above stated—of the effect of this evidence the court instructed the jury that they were the judges.

The court further charged the jury, that if a race had been run between the plaintiff and Vance, and lost by the former, the plaintiff could not recover in this action, unless he proved that he gave the defendant notice to pay over the 'stakes,' previous to the payment. The question of notice being the only material one before them, they could not inquire whether the race was fairly won or lost. A verdict was returned for the defendant, and judgment was rendered accordingly.

T. J. JUDGE and J. D. F. WILLIAMS, for the plaintiff in error made the following points: 1. The testimony as to the terms of the wager, and who was the winner according to these terms was improperly excluded. [5 T. Rep. 405; 4

Taunt. Rep. 474.] 2. If the plaintiff was the winner, he had the right to recover the whole of the money deposited; and a stakeholder cannot plead the illegality of the wager. [1 B. & P. Rep. 3, 296; 12 Law Jour. 34; 13 East. R. 20.] 3. The defendant paid over the money in his own wrong—the testimony shows that the plaintiff was at least entitled to recover the amount of his own deposit. [8 B. & Cresw. R. 221; 5 T. Rep. and 4 Taunt. R. *ut supra*.]

No counsel appeared for the defendant.

COLLIER, C. J.—The act of 1807, declares that all promises, agreements, &c. made, signed, &c. by any person whatsoever, where the whole or any part of the consideration of such promise, agreement, &c. shall be for money or other valuable thing whatsoever, laid or betted at any horse race, &c. shall be utterly void and of no effect, to all intents and purposes whatsoever. [Clay's Dig. 257, § 1,] In Wood v. Duncan, 9 Porter's Rep. 227, it was decided that this statute makes void all "promises, agreements, &c." by which parties stipulate to pay to each other, money, or other thing of value, upon the event of a horse race, or other description of gaming. That was an action to recover a sum of money placed by the plaintiff in the hands of the defendant as a stakeholder—being a wager between the plaintiff and a third person upon the result of a horse race. The plaintiff gave notice to the defendant not to pay over the money to the other party, who was announced by the judges of the race as the winner, and demanded that the same be paid to him—which demand was refused. It was said by the court, that "the defendant has parted with his money, without the inducement of a consideration, either good or valuable, and upon an agreement void by the law; the plaintiff retains it without any claim, either in his own right or on account of another; according to well settled principles, he is bound *ex aequo et bono*, to refund it to him who once had possession, and has never, by any legal act parted with the right." This decision is reaffirmed in Shackelford v. Ward, 3 Ala. R. 37—this court deciding, that where money wagered is deposited with a stakeholder, it may be reclaimed by either party

before it is paid over, by a notice not to pay it, and no special demand is necessary to entitle the party giving notice to maintain an action against the stakeholder, where the latter afterwards paid it to the supposed winner. [See also, 11 Johns. Rep. 23; 2 Murph. Rep. 172, 458; 1 Nott & McC. R. 178; 3 Penns. R. 494; 3 N. Hamp. R. 152; 6 Yerg. R. 288; 1 C. & M. Rep. 797; 7 Price's Rep. 540; 6 D. & R. Rep. 26; 1 C. & P. Rep. 613; 2 B. & P. Rep. 467; 9 East Rep. 52; 3 Taunt. Rep. 277.]

In the case at bar, it was proved that two of the three persons selected as judges of the race decided against the plaintiff, and the defendant inquired of him if he objected to the payment of the money to the other party, to which he replied, "if all the judges have decided against me, then pay over the money; but I have understood that one of the judges has refused to decide against me." It was further testified, that the plaintiff said the judges were gentlemen—he would not dispute what they did, and if they decided against him, Vance should have the money.

There is no particular form of words necessary to inform a stakeholder that a party depositing money in his hands as a wager, objects to its payment to the supposed winner; any words expressive of a prohibition to pay, absolutely or conditionally, are quite sufficient. They should be such as would be altogether intelligible; and not of such dubious import as to leave it uncertain what the depositor intended, or whether the authority given when the money was deposited, was revoked. It cannot be assumed as a legal conclusion, that what passed between the plaintiff and defendant was insufficient to indicate the objection of the former to the delivering over the deposit. The defendant inquired if the plaintiff objected to its payment to the supposed winner, and was answered, no, if all the judges had determined that Vance was entitled to it, but he (plaintiff,) understood that one of them refused to decide against him. Is not this sufficient when connected with the fact that one of the judges had not decided adversely to the plaintiff, to establish a notice to the defendant, of the plaintiff's objection to the payment of the money? Does it not amount to a prohibition to give up the money, unless the judges were unanimous in their decision

that it had been lost? Admitting the truth of the testimony, and these questions, we think, receive an affirmative answer.

Without stopping to consider the charges prayed, in detail, it is obvious from the view taken, that one or more of them at least should have been given. The refusal to give them was not divested of error by charging that there was no proof of any notice to the defendant not to pay over the money to the winner, unless such notice could be implied from the evidence recited in the bill of exceptions, of which the jury were judges. It has been repeatedly decided by this and other courts, that where a party prays an instruction appropriate to the evidence, and conformable to law, it should be given, and the refusal cannot be excused by giving other charges of equivalent import. The jury were certainly judges of what particular facts were proved, yet if they found the testimony to be true, the court might say what it established, or it might have charged hypothetically, as is usual and proper.

What has been said is decisive of the case—the judgment is consequently reversed, and the cause remanded.

WEISSINGER v. THE STATE.

1. It is irregular to tax an attorney's fee and the county tax upon a judgment *nisi* on a recognizance, when the judgment is afterwards at the same term set aside on condition that all costs shall be paid.
2. A writ of error will lie against the State on the refusal of the court to strike out improper items in the bill of costs in a State case, and the State is a proper party.
3. But where no judgment is entered on the motion, there is nothing to sustain a writ of error, and if one is sued out it will be dismissed.

Writ of Error to the Circuit Court of Perry.

WEISSINGER and JOHNSON were indicted in the circuit court of Perry for charging and receiving tolls unlawfully on the Cahawba river. Weissinger entered into recognizance with A. B. Moore as surety, binding himself and surety each in the sum of \$100 for his appearance, and Johnson in the same manner, with H. Davis as his surety. Having failed to appear, recognizances were estreated, a judgment *nisi* entered against the sureties as well as the principals, and *sci. fas.* were ordered. Afterwards, during the same term, both defendants appeared, and the judgments *nisi* were set aside on payment of all the costs. No *sci. fas.* were issued or other proceedings had on the judgments *nisi*.

On this state of the record, the clerk taxed each of the defendants with a solicitor's fee of \$6, and the county tax of \$2. The defendants moved to strike out those items from the bill of costs and to re-tax the same, but the court ruled these items were properly charged, and refused to strike them out.

A joint writ of error was sued by Weissinger and Johnson, but on motion, it was amended by striking out the name of the latter.

The refusal of the court to strike out the disputed items is now assigned as error.

A. B. MOORE, for the plaintiff in error, insisted that the solicitor was not entitled to a tax fee, unless a *sci. fa.* was issued and successfully prosecuted. [Smith v. State, 7 Porter, 495; Digest, 236.] A suit cannot be said to be commenced until a *sci. fa.* is actually issued, nor is the county tax to be assessed except in such cases. [Digest, 575, § 94.]

ATTORNEY GENERAL, contra, argued the writ of error should be dismissed, as the State is no party, nor has any interest in this matter. If the case is subject to revision, the officers interested, and not the State, should litigate the questions. If the cause is reversible here in the manner presented, then he contended:

1. The judgment or the recognizance is several, and each

one is responsible for costs. [Hamer v. State, 1 Ala. Rep. 120.]

2. The solicitor had the right to prosecute a *sci. fa.*, and the court having declined to excuse the default without the solicitor's consent, that consent ought not to deprive him of fees to which he otherwise would have been entitled. But independent of this, the court had the right to grant or refuse the excuse, and having imposed the costs, and afterwards refused to diminish those taxed, no other court will revise the discretion. [Digest, 481, § 33; Reynolds v. Bell, 3 Ala. Rep. 57; Cunningham v. Pool, 9 Ib. 615.]

GOLDTHWAITE, J.—1. The statutes which authorize the fee to the attorney, as well as the county tax, speak of suits either as commenced or prosecuted or defended. [Dig. 236; Ib. 575, § 94.] In our judgment, there is no sufficient reason to consider the estreating of a recognizance by a judgment *nisi*, as a suit either commenced or prosecuted. The judgment *nisi* is in no sense of the term, process commencing a suit, but is rather the foundation upon which a suit may afterwards be prosecuted by *sci. fa.* We think it clear the items, both of attorney's fee and county tax, were improperly taxed, and should have been rejected by the court.

2. But the Attorney General urges that the State has no interest in this matter, and therefore should not be a party to the writ of error, but rather that those interested in the fees allowed should litigate this question. It would perhaps be desirable that such a rule could be adopted, as suitors would thus be relieved from prosecuting questions in which they have little or no interest; but we are aware of no warrant to introduce the officers of court upon the record, even in matters of cost. The question of taxing and re-taxing costs has been several times before the court by writ of error—[Kelly v. Renfro, 10 Ala. Rep. 338; Braly v. Hodges, 3 Porter, 336; Smith v. Donaldson, 3 S. & P. 395]—and although the practice is certainly inconvenient as well as expensive, there seems no other mode in which a revision can be had.

3. In this cause, however, the writ of error must be dismissed because of the omission of the record to disclose that any judgment whatever was rendered on the motion to re-

tax the costs. The only judgments which are made to appear in the transcript are those estreating the recognizance and afterwards discharging the defendant from the indictment by sustaining a demurrer to it. Neither of these are brought up by the writ of error, and if they were both before us, there is nothing to reverse them. It is true, the bill of exceptions states the questions supposed to arise, and on which our opinion has been already expressed, but this will not supply the place of a judgment. For any thing which appears, the same questions may again be considered at another term, and the costs then re-taxed.

Writ of error dismissed.

GIVENS, USE, &C. V. ROGERS, ET AL.

1. A promise in writing by one to pay double the value of a wagon and harness, which was delivered to him, in the event that James K. Polk was elected President of the United States over Henry Clay, in 1844, is a wager prohibited by the act forbidding betting on elections in this State, and cannot be recovered.
2. One taking such a note, on the admission of the maker that it was good, and he would pay it, cannot recover, because the note itself disclosed the illegality of the consideration.
3. In a suit on such a note, against the maker and his sureties, a recovery cannot be had on the common counts, the wagon not being in the possession of the sureties.

Writ of Error to the Circuit Court of Talladega..

THE suit was commenced before a justice, by the plaintiff in error, on five bonds for \$44 each, by which the defendant in error promised to pay the plaintiff \$44 when James K. Polk should be elected President of the United States, over Henry Clay, in 1844. The justice rendered judgment in each case in favor of the plaintiff, from which an appeal was

taken to the circuit court, where the cases were consolidated.

The plaintiff filed a declaration consisting of several counts, in which it was averred that James K. Polk was elected President of the United States, in 1844, over Henry Clay, and a common count for the sale of goods, wares, and merchandize, &c.

The parties agreed upon the following facts: That the notes were executed by Rogers as principal, and the other parties as his sureties, for a wagon and harness, proved to be worth \$125. That the wagon and harness were seen in the possession of Rogers, and Maberly, after November, 1844, and ever since, and that Ware assisted Rogers in receiving them out of the possession of plaintiff. Rogers told an agent of the plaintiff, who was sent to him with the notes, that they were good, and he would pay them. This was after the notes were due, and the promise of Rogers was communicated to Cunningham & Dixon, for whose use the suit is brought.

Upon this state of facts the court rendered judgment for the defendant. This is now assigned as error.

S. F. RICE, for the plaintiff in error.

1. Notes given "for a wagon and harness, proved to be worth one hundred and twenty-five dollars," sold *and delivered* to the principal maker of the notes, are valid. And the mere fact that such notes are given in October, 1844, and made payable when James K. Polk should be elected President of the United States, over Henry Clay, in 1844, will not invalidate the notes. The *consideration* is not illegal.—[Wright v. McAlexander, at the present term, and cases therein cited.]

2. The only possible objection that could be made against the validity of such notes, is, they are wagers upon "an election in this State." The decisive test of the soundness of this objection is, could an indictment for betting on an "election in this State," be maintained upon the facts above disclosed in connection with the notes?

3. If four persons obtain the property of another, by giv-

ing notes which are void ; yet if they keep and use the property, and after having thus kept and used it for a considerable time, promise to pay the notes, and thereupon are still permitted to keep and use the property, such promise will give validity to the transaction, because made on sufficient consideration, to wit, the continued use of the property.— [Stover v. Herrington, 7 Ala. R. 151; Evans v. Keeland, 9 Ib. 42; Kennon v. McRae, 1 Ib. 295.]

4. If such promise is communicated to third persons, who thereupon purchase the notes, the parties to the notes are estopped from insisting that they are not liable on such notes or such promise. [McRae v. Kennon, 1 Ala. R. 295.]

5. Whenever trover will lie, assumpsit may be maintained. And if the notes are void, the facts agreed show a conversion of plaintiff's property by defendants, and the value of the property. [Powell v. Olds, 9 Ala. R. 861.]

6. Conceding (for argument sake) that the *loser* cannot recover back property lost at gaming, yet that is not this case. If there is a bet, it is the *winner* here suing for the value of property of which he has been illegally deprived—deprived by *false pretences*. And he may recover it back, or its value. [Cope v. Williams, 4 Ala. R. 264.]

7. The case is even stronger than that. It is the *bona fide* transferees of the winner, here asking justice, upon the additional ground that they have been induced to become such transferees by the verbal promise of defendants, made "*after the notes were due*," to pay the notes.

W. P. CHILTON, for the defendants.

1. The contract sought to be recovered upon, is a wager upon the Presidential election, and the fact is clearly stamped upon the face of the notes. Aside from the notes, the proof declares that Rogers, who is the principal in the notes, agreed to pay double price for a wagon if Mr. Polk was elected President in 1844, and was to have the wagon for nothing, if he was not elected. Being a wager, this court will not enforce it, because—1. Such betting is expressly prohibited by our statute, and a contract founded on an act prohibited by statute is void. [Clay's Dig. 435, § 23; O'Donnell, et

al. v. Sweeney, 467 ; Tindall v. Childress & May, 2 S. & P. 250 ; Roberts v. Taylor, 7 Por. 251 ; Wood v. Duncan, 9 Ib. 227 ; Barker v. Callehan. 5 Ala. R. 708 ; Wheeler v. Russel, 17 Mass. R. 258.]

2. But if not void for the reason above assigned, the contract is against public policy, as its direct tendency is to corrupt the ballot box, the purity of which is one of the best safeguards for the perpetuity of our free institutions. [McAllister v. Hoffman, 16 Serg. & R. 147 ; Story on Con. 128, § 200 ; 4 Johns. R. 425.]

3. The sureties not being bound on the note, cannot be charged by any admissions the principal may have made concerning it.

4. The action being against several, who are not sued as partners, plaintiff must recover against all or none.

ORMOND, J.—The principal question in the cause is, whether the contract here sought to be enforced, is a wager, within the statute of this State prohibiting betting on elections. The act declares, that “every person who shall hereafter make any bet, or wager of money, or other thing of value, upon any election in this State, shall be deemed guilty of a misdemeanor,” &c. [Clay’s Dig. 435, § 23.] It is contended that a bet upon the Presidential election is not an election in this State, within the meaning of the act. The election of President, is certainly an election in this State, unless the fact that the election is held for that officer in all the other States of the Union, prevents it from being an election held in this; but as the greater must include the less, this proposition is manifestly untenable. It is then literally, and in the most restricted sense which can be applied to the terms employed, an election within this State.

If however, we abandon the literal interpretation, and with a view to ascertain the meaning of the terms employed, look at the mischief intended to be prevented, no doubt whatever can remain of the sense of the expressions employed. The object was to preserve the purity of the ballot box, by preventing improper influences from being brought to bear upon the electors, who should cast their votes from high considerations of public duty, without regard to the private in-

terest of any one. The practice of betting at elections, by substituting private, for the public interest, is not only well calculated to mislead the judgment of the actors engaged in it, but exposes others to improper solicitation, and mixes up with the natural elements of party strife inseparable from a popular election in a country like ours, the unnatural stimulant of private interest. It is therefore undeniable, that such a practice is hostile to the purity of the elective franchise. Such being the motive for the passage of the act, what possible inducement could be presented to the mind of the legislature for confining the law to elections for State officers, and to legalize this pernicious practice in the most important election known to our institutions? We can conceive of none, and think therefore that there is no reason for restraining the terms employed, and giving them a narrower meaning, than they import in their natural, and proper acceptance.

Having ascertained that a wager upon the Presidential election is within the letter, as well as the intention of the law, we proceed to consider whether the facts agreed in this case, establish that such a bet was made. We consider it perfectly clear, that the facts agreed do establish, that the parties made a bet, upon the result of the Presidential election, in which the plaintiff staked his wagon, against the promise of the defendant to pay about double its value, if he lost the wager; and as the wagon was delivered to the defendant, it is precisely the same as if the wagon on one side, and its value on the other, had been placed in the hands of a stakeholder, to abide the result. But it is insisted that as the intention of the parties to violate the law, is not admitted, this court cannot know that such a violation was intended. The facts being admitted, whether they amount to a bet on the Presidential election, is matter of law, and being ascertained to be a wager prohibited by law, the intent is inferable from the act itself, as every one is presumed to intend the necessary consequence of his acts. It can make no difference that it assumes in this case the form of a contract, it is nevertheless both in its form, and essence, a wager, prohibited by law, and is void.

If this contract was not void for this cause, it would be

so on the ground that it was contrary to public policy, to enforce a contract, the direct and inevitable tendency of which is, to contaminate the elective franchise. See the cases referred to on the brief of the defendant in error.

It is urged, that conceding the act to be a wager, yet the notes by which it was evidenced, were taken by the persons for whose use the suit is brought, on the faith of the assurance of Rogers, that they would be paid. It has been held that if an innocent man is induced by the promise of the maker of a gaming security to take it, he will not be permitted afterwards to take advantage of the illegality of the instrument. [Beverly v. Smith, 1 Wash. 296; Hoomes v. Smock, Id. 390.] Those are cases, where the assignee was ignorant of the illegality of the instrument, and was induced to invest his money in it, by the promise of the maker. Here the illegality of the promise was apparent on its face, the purchaser therefore could not be an innocent holder. Nor if this promise was available against Rogers, the principal, would it avail against the sureties, who are sued jointly with him, and who it is not pretended, have by their promise induced the purchase of the note

It is also insisted, that if there can be no recovery on the note, the value of the wagon and harness may be recovered upon the common count in assumpsit.

Conceding that upon the conversion of this wagon and harness, an action would lie against the person converting it, either of trover or assumpsit, it is manifest no such recovery can be had in this action, as it is not shown that the wagon has ever come to the possession of these sureties. The action being against all the defendants upon a contract, the recovery must be against all or none.

Judgment affirmed.

CALDWELL v. THE BRANCH OF THE BANK OF
THE STATE OF ALABAMA AT MOBILE.

1. *Semble*: A plea in abatement is bad on demurrer for duplicity.
2. Where the writ is at the suit of the *Branch Bank at Mobile*, and the declaration in the name of the *Branch of the Bank of the State of Alabama at Mobile*, (the designation employed in the charter,) the variance is no ground of abatement; for if the names are not substantially the same, the writ may be amended on motion, so as to make it conform to the declaration.
3. A variance between the indorsement on the writ, and the declaration, is not pleadable in abatement.
4. Since the act of December, 1841, a note payable to the *cashier* of a bank may be sued on in the name of the corporation.

Writ of Error to the Circuit Court of Monroe.

THIS was an action of assumpsit at the suit of the defendant in error. The writ required the defendant to answer to the Branch Bank at Mobile, and the cause of action indorsed is a promissory note made by the defendant, and payable to "B. Gayle, Cashier, or bearer." The declaration is in the name of the "Branch of the Bank of the State of Alabama at Mobile," on a promissory note made by the defendant and delivered to the plaintiff, by which he promised to pay "B. Gayle, Cashier, or bearer," &c. negotiable and payable at the branch bank, by the name described in the declaration: and "then and there promised to pay the amount of said note to the plaintiff according to the tenor and effect thereof, yet disregarding his promise, &c.

In the record we find the following: "The defendant pleads in abatement in short by consent, the variance between the writ and declaration in this, that the writ is to answer to the Branch Bank at Mobile, and is declared upon in the name of the Branch of the Bank of the State of Alabama at Mobile; and also in this, that the cause of action indorsed on the writ is made and signed by William Caldwell alone, and the declaration is upon a note made by William Caldwell,

together with one Squire Reed and Samuel G. Portis." This is signed by counsel, and demurred to by the plaintiff. The demurrer was sustained, and the defendant declining to plead over, judgment was rendered in favor of the plaintiff.

E. W. PECK, for the plaintiff in error. The plea in abatement is good, and should have been sustained. But if the plea is bad, the declaration discloses no cause of action on which the plaintiff can recover—the note being payable to "B. Gayle, Cashier," and the plaintiff showing no legal title to it. The act of 1837 does not entitle the bearer of such paper to sue thereon without showing an indorsement. [3 Ala. Rep. 153; 5 Id. 26.]

LESLIE, for the defendant in error. Defects of form in pleas in abatement may be reached by general demurrer. [9 Port. Rep. 195; 5 Ala. Rep. 617.] Such a plea is bad, if it embraces two distinct matters of abatement. [6 Ala. Rep. 468.] A plea in abatement for a variance between the writ and declaration, should set out the writ on oyer. [9 Port. Rep. 195.] The statute entitles the bank holding a note payable to the cashier, to sue on and collect it in its own name. [Clay's Dig. 112, § 47.]

COLLIER, C. J.—It is certainly true that in pleas in abatement, matters of form are regarded as substance, and that the statute abolishing special demurrers does not apply to them. [5 Ala. Rep. 617.] In Cobb v. Force, Brothers & Co. the plea in abatement of an attachment, set up two distinct grounds of defence, viz., that the plaintiff had not executed a bond and made the affidavit as directed by the statute. This court said, "the rule is, that a plea is double when it states two or more facts, either one of which would constitute a defence." So it has been held that a variance between the indorsement on the writ and the declaration, cannot be pleaded in abatement; but if the plaintiff should declare in a cause of action entirely different from the indorsement on the writ, the court would on motion refuse to permit the declaration to be filed. [7 Ala. Rep. 829.] In Coalter v. Bell, 2 Stewt. & Port. Rep. 358, it was decided

that where the facts averred in a plea in abatement do not appear upon the record, affidavit should be made of their truth; and if they are not verified, a demurrer to the plea should be sustained. Perhaps the matter of the plea in the case before us may be considered as verified by a comparison of the writ with the declaration; but however this may be, is not the plea bad for duplicity? It insists that there is a variance between the writ and declaration; first, in the plaintiff's name; and secondly, because the cause of action indorsed on the writ, is not that declared on.

The name of the plaintiff it is believed is *substantially* the same both in the writ and declaration, and this is considered sufficient. [Ang. & A. on Corp. 510 to 516.] But if the variance be material, we think the fair inference is, that the name of the plaintiff in the writ was intended to be the same as that stated in the declaration according to the act of incorporation; that the writ may be amended on motion, and the mistake is no ground for abatement. In respect to the indorsement on the writ, we have seen that its variance from the declaration cannot be pleaded in abatement; if it could, we should regard it as wholly immaterial.

The cases cited by the counsel for the plaintiff in error, from 3 and 5 Ala. Reports, which decide that a bank cannot maintain an action upon a note payable to its cashier, without showing an indorsement were determined by the primary courts, and the former in this court previous to the passage of the act of December, 1841. The statute declares that all notes, &c. thus payable "may be sued and collected in the name of the several banks, in the same manner, as if they had been made payable directly to the said bank, or branch banks by which the paper has been taken or discounted." [Clay's Dig. 112, § 47.] In Crawford, et al. v. Branch Bank at Mobile, 7 Ala. Rep. 383, it was held under the act cited that a note payable to "B. Gayle, Cashier," authorized the branch bank to sue thereon, and the inference was, that it had the legal title. There is then no error in the record, and the judgment must be affirmed.

NANCE v. HOOPER.

1. The orphans' court, under the act of 1835, has no jurisdiction to assign dower unless of lands of which the husband died seized.
2. A sale of the husband's interest in lands under a *fi. fa.* does not affect the widow's right to dower in the same lands.

Writ of Error to the Orphans' Court of Pickens.

THIS is an application by Sarah Hooper, to the judge of the county court of Pickens county to assign dower in certain lands described in the petition. After the filing of the petition, James Nance appeared before the court, and having suggested he was the owner of one of the tracts described therein, prayed to be permitted to contest her right to dower in the same. This was allowed, and he then pleaded that the husband of the petitioner was not at the time of his death seized and possessed of any interest in the land of which the petitioner is entitled to dower as the widow of her said husband.

The cause was heard at a regular term of the orphans' court, held on the second Monday of November, 1846. The petitioner produced a patent for the tract of land issued by the United States in the year 1820, to her husband. The contestant then proved a sheriff's deed for the same land, dated in 1826, and reciting a sale and conveyance by virtue of a *fi. fa.* against the petitioner's late husband to one John Hooper, by whom it was conveyed in 1838 to James H. Hooper in fee simple, and as his property was seized and sold to the contestant in 1844 by virtue of a *fi. fa.* against him.

On this evidence, the court ruled that the sale of land by the sheriff under a writ of *fi. fa.* in the lifetime of the husband, did not bar the petitioner, then being his wife, from obtaining dower in the land.

This ruling was excepted to, and the court having awarded a writ of admeasurement of dower, the contestant sues out his writ of error, and here assigns—

1. That the court erred, in the ruling at the hearing.
2. In giving judgment for the demandant, when it should have been for the contestant.
3. That the court had no jurisdiction.

H. STITH and B. W. HUNTINGTON, for the plaintiff in error, made the following points:

1. The orphans' court has no jurisdiction of dower suits. [Barney v. Frowner, 9 Ala. Rep. 901.] Nor will the appearance of the party contesting the dower prevent him from showing the defect of jurisdiction. [Wyatt v. Judge, 7 Port. 37; McDaniel v. Moody, 3 Stewart, 314.]

2. The widow in this State is endowable only of lands whereof the husband died *seized and possessed*, or had *conveyed* before his death. [Digest, 172, § 3.] But all lands are subject to the payment of judgments and decrees; (Ib. 205, § 17,) and such from their rendition are *liens* throughout the State; (Morris v. Ellis, 3 Ala. Rep. 560; Campbell v. Spence, 4 Ib. 543,) therefore, if the lands of the husband are sold before the dower attaches, there is no seizin at the time of the death, or conveyance during the lifetime. The declaration that land shall be subject to the payment of judgments, is inconsistent with the retention of any claim to dower of the land as sold under the judgment.

3. In other States, it has been held that an assignment of dower by the probate court is bad, if the husband did not die seized. [Fink v. Eastman, 5 N. H. 240.] And in Scott v. Croosdale, 1 Yeates, 75, a sale under a *levari facias* was held to defeat the dower of the wife.

4. But if the widow is dowable, she cannot stand in a more favorable condition than if her husband at the time of the sheriff's sale had conveyed by deed. In such case, after his death she is not dowable of the land, but only a third of its value at the time of sale, (Barney v. Frowner, 9 Ala. R. 901; Hale v. James, 6 Johns. Ch. 258,) or only of interest annually on one-third the value. [Watson v. Davisson, 2 Roberson, 384; 7 Cranch, 380.]

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. Previous to the examination of the principal question presented in this cause, we shall dispose of that relating to the jurisdiction of the court. In *Barney v. Frowner*, 9 Ala. Rep. 901, the application for dower embraced several distinct parcels of land which had been sold by the husband, and we considered the general statutes on the subject of dower as not investing the orphans' court with the jurisdiction to hear and determine such cases. We did not then advert to a statute passed in 1835, because our attention was not called beyond the general law. This statute would have produced no change in the conclusion upon that case, though the expressions then used with reference to the want of jurisdiction could have been appropriately qualified by showing the effect of the latter act. That is in these words: "Whereas, doubts have arisen whether or not judges of the county courts could make decrees for the sale of real estate of deceased persons, and exercise other powers in relation to the same at the terms of the county courts held in vacation, for remedy whereof, be it enacted, &c. that it shall be lawful for the several judges in this State to hear and determine all applications for dower, as well as applications to sell the real estate of deceased persons, at any of the terms of said court." If the intention of the declaratory act was to invest the orphans' court with entire jurisdiction over all suits which may arise out of applications for dower, it certainly was a great omission not to provide the means for trying contested issues of fact; and even if this mean was provided, or could be called into existence by construction, the difficulty would remain of adjourning or continuing the cause from one fortnight to another until the cause was prepared for trial. Yet it is evident enough that some jurisdiction over the subject matter was intended. The preamble to the statute in our judgment furnishes the key to unlock its meaning. Doubts had arisen whether the judges of the county courts at the courts held in vacation could make decrees for the sale of *real estate of deceased persons*, and exercise *other powers* in relation to the same. Now, in no sense of the terms can real estate which one has sold in his lifetime be said to belong to his estate upon his death, and it is not to such estates the statute has reference. But lands of which

the deceased was possessed at the time of dying would certainly fill the description in the preamble, and it is with relation to these that the *other powers* are in our judgment to be exercised. The orphans' court, previous to the enactment of this statute, was invested with a very general jurisdiction over the real and personal estates of decedents, and there is an obvious propriety in investing this court with jurisdiction over the matter of dower in such lands as at the time of its enactment passed to the heir, and over which by a later statute the personal representative may exercise the power of renting. [Digest, 199, § 36.] In Kentucky, the general statutes in relation to dower vested the determination of suits for dower in the circuit courts, but a declaratory act very similar to that we have just construed was subsequently passed, which after reciting that doubts had arisen whether the county courts had jurisdiction to appoint commissioners to assign dower, proceeded to confer the jurisdiction; yet the court of appeals of that State held that dower by virtue of this act could not be assigned by commissioners thus appointed, when the lands of which dower was claimed had been sold by the husband. The terms of the statute are as general as our own, but the decision is arrived at on the grounds which we have placed that now made. [4 Bibb, 462.] In other States, similar statutes investing the ordinary courts with power to assign dower, have received the same construction. In Massachusetts and New Hampshire the power is given in general terms, yet in both States it is held the probate courts have no jurisdiction to set off dower in any other lands than those of which the husband dies seized, though the widow's right attaches to all lands of which he was seized during coverture. [Pinkham v. Gear, 3 N. H. 163; Sheaff v. O'Neal, 9 Mass. 9.] These reasons and authorities lead us to the conclusion that the act of 1830 does not invest the orphans' court with jurisdiction over the subject of dower, except of such lands as the husband had seized at his death. Whether it has jurisdiction even in those cases, if there is a contest of fact, need not be decided. As the court below was without jurisdiction to assign dower in the particular tract of land claimed by the contestant, the judgment, as it affects him, must be reversed, but the application in-

cluding other lands which may be presumed to have been held by the husband at the time of his death, the cause will be remanded for further proceedings with reference to these.

2. As the plaintiff in error presses for a decision of the principal question, and as that has been sufficiently argued, we proceed to pronounce our opinion upon it, as otherwise it may return in another suit. The only decision, to which our attention has been directed, holding a sheriff's sale as destroying the right of the wife to dower is in *Scott v. Croosdale*, 1 Yeates, 75, S. C. 2 Dallas, 127. That seems to establish that in Pennsylvania the widow is dowable only of such lands as remain of the estate of her husband after payment of his debts. The lands were sold under a *levari facias* against her husband's executors, and the sale was held to take away her dower estate in the particular lands. But even in that State, it would seem that if the lands had been sold under a *fi. fa.* against her husband in his lifetime, the widow's right would remain unaffected. This was held some three years after the decision of *Scott v. Croosdale*, in regard to an estate tail held by the husband, but sold under a *fi. fa.* against him. [*Sharp v. Pettit*, 1 Yeates, 339.] The rule is believed to be general in those States where the common law prevails, or where the common law right of dower is not materially changed by statute; but the widow is dowable of all lands held during coverture by the husband under a legal seizin. In *Ayer v. Spring*, 9 Mass. 8, the land of which dower was demanded had been extended and sold under an execution, yet the widow was held dowable of its value at the time of the execution, though not of its increased value by reason of improvements made afterwards. In *Embree v. Ellis*, 2 Johns. 123, the lands were sold under *fi. fa.* against the husband, but this, so far from defeating the claim of the widow, was, coupled with his previous possession, the only title shown in him to support the dower estate. In *Harrison v. Eldridge*, 2 Halst. 392, the husband and wife both joined in a mortgage, and the land was afterwards sold by the creditor under a *fi. fa.* against the husband, but neither the sale nor the mortgage were considered as destroying the dower estate as against the purchaser. Other cases asserting the same principle, it is supposed could be found, but

these are amply sufficient, in our judgment, to show how little ground there is to suppose the dower estate affected by a sale of the husband's interest under a *fi. fa.* Our statutes in relation to the subject of dower have not materially changed the common law. By one it is expressly provided the widow shall be dowable of one-third part of the lands, although the estate of the husband may be insolvent; and by another, this third part is to be of the lands of which the husband shall die seized, or shall have conveyed before his death, whereof the widow has not relinquished the dower. [Digest, 172, § 2, 3.] As the husband cannot by his conveyance affect the right of the wife to dower, it would be strange if this effect should be produced by a sale under a *fi. fa.*, for it would always be in his power to produce this result as easily as to make a conveyance. The circumstance that lands are made subject to the payment of judgments and decrees does not touch this question, because the right of dower is no part of the husband's estate, but is an interest which the law vests in the wife, and is thus protected against any alienation or incumbrance made or created by the husband. We think it clear the sale under the *fi. fa.* of the husband's interest, left the wife's right of dower as it previously was.

Judgment reversed and cause remanded.

SPENCE, ET AL. V. RUTLEDGE, ADM'R.

1. A notice to a sheriff, setting forth a demand, need not state the day on which the demand was made.
2. It is not necessary to alledge in a notice, that the plaintiff resided in the county where the judgment was rendered. If he resides in a different county, it is a matter of defence to the sheriff, who by making that proof, will cast on the plaintiff the necessity of proving a personal demand, or by an order in writing.

Spence, et al. v. Rutledge, Adm'r.

3. Where there is a variance of two dollars between the execution as described in the notice, and the one offered in evidence, it may be amended in the court below, otherwise it will be fatal on error.
4. When the notice is to the sheriff, the record must show that those against whom the judgment was rendered as his sureties, were proved to be such; and if not done in the court below, the proof cannot be made in this court.
5. A demand of the sheriff by the attorney of record, is in law a demand by the plaintiff.

Error to the Circuit Court of Talladega.

MOTION by the defendant in error, against Spence, sheriff of Talladega, for failing to pay over on demand, money collected by execution.

A notice in the usual form was served on the plaintiff in error, by which he is informed that he had collected \$400, on a particular execution, which is described, and upon which after paying all costs, commissions, &c. there remained the sum of \$374 12, to apply to the said execution, "which monies you have failed to pay over on demand of the said plaintiff."

Whereupon he was notified, that on the 15th day of the present term of the court, or so soon thereafter as the court would entertain the motion, a motion would be made against him and his sureties, for the money so collected, together with five per cent. per month from the time of making such demand.

Service of the notice was accepted by the sheriff.

The sheriff appeared and demurred to the notice, or suggestion of the plaintiff, and the court overruling the demurrer, he took issue upon the facts.

The plaintiff then produced the execution described in his notice, with the indorsement of the sheriff thereon, as set forth in his notice, and offered to prove by Alexander White, the attorney of record of the plaintiff, that on the 26th June, 1845, he demanded the money of said Spence, and that he did not pay it. To the introduction of this proof of demand, the defendant objected, but the court overruled the objection, and the plaintiff excepted.

The jury found a special verdict, that a certain execution came to his hands, which is particularly described, and differs from the execution described in the notice, in the amount of the judgment, in this, that in the notice the judgment is stated to be for \$592 20, and in the verdict \$590 20; that he received thereon, after paying costs, fees, &c. \$374 12, on the 25th October, 1844, and that he was sheriff at the time. That on the 26th June, 1845, the money was demanded of him, by A. White, the attorney of record of the plaintiff, and that he refused to pay.

Upon this verdict the court rendered judgment against the sheriff, and certain other persons, his sureties in office, for the sum of \$548 73, besides costs.

The defendants now assign for error—

1. The overruling the demurrer to the notice.
2. The admission of the evidence to prove a demand.
3. In the judgment rendered upon the verdict.
4. In the final judgment.

S. F. RICE, for plaintiff in error.

1. In a summary proceeding against a sheriff for failing to pay over money collected, it is necessary to alledge a special demand, and by whom, and in what county, and when made. [Barton v. Peck, 1 S. & P. 486; 1 Chitty's Pl. 323, 324; Broughton, et al. v. The State Bank, 6 Porter, 48; McBroom v. Governor, Ib. 32; Brazeal, et al. v. Smith, 5 Ala. R. 206; Allen v. Gant, 1 A. K. Marsh. 409; Davis v. Armstrong, Ib. 364; Clay's Dig. 217, § 82.]

2, If a demand by "the plaintiff," is alledged, it is not sustained by proving a demand by the plaintiff's *attorney*. One party cannot thus mislead his adversary by his pleading—especially in a summary proceeding. [Torbert v. Wilson, 1 Stew. & Por. 204.]

3. A notice when pleaded to, in such cases, is in the nature of a declaration, and is a part of the record. [Walker, et al. v. Turnipseed, 8 Ala. R. 679.]

4. In proceedings of this kind, a misdescription of the execution is a fatal defect; and if the verdict of the jury shows that the money was collected on an execution different from that described in the notice, a judgment on that verdict can-

not be sustained. No amendment of the verdict can now be made, and no intendment can be made that the jury did not find what they have written out as their verdict. [Johnson, et al. v. Gray, 6 Ala. R. 276.]

5. The judgment is fatally defective in not showing that there was any proof as to who were sureties of Spence.

6. In penal actions, or summary proceedings for penalties, the declaration or notice must show that the plaintiff's claim is not barred by the act of limitations, and every other fact which gives the right to the penalty. Under this rule Rutledge should have averred that he was a citizen of Talladega county, or that the demand was made in Talladega county. [1 Marsh. *supra*.]

L. E. PARSONS, contra.

ORMOND, J.—We will consider the questions raised in the order they were made in the argument. The case of Price v. Cloud, 6 Ala. Rep. 253, is decisive, that in a notice for a motion of this kind, it is not necessary to state the day when the demand was made, but that a general averment, that demand was made, is sufficient, if it sufficiently appear that the demand was made before notice of the motion, and after the money was collected. That does appear in this notice, as it states the receipt of the money by the sheriff, on the execution, and proceeds, “which monies you have failed to pay over on demand to the plaintiff.” This is certainly sufficient as a notice, although on the trial it was necessary to prove the day when the demand was made.

It is further contended, that the notice should alledge that the plaintiff resided in the county where the judgment was rendered, or that a demand was made in Talladega county. This argument is founded on the act requiring the creditor to appoint an agent in the county, where the execution is levied, when he resides in a different county, to whom the sheriff may pay the money, &c. [Clay's Dig. 217, § 82.] The act proceeds to declare, that if such agent is not appointed, no judgment shall be rendered for nonpayment, unless a demand be first made of a sheriff in his county, by the creditor, or by some person having a written order from him. It

is obvious this is matter of defence for the sheriff, who by proving the fact, that the creditor did not reside in the county where the execution was levied, would cast on him the necessity of making proof of demand, either personally or by an order in writing.

The variance between the execution on which the jury have found the money was collected, and that described in the notice, is fatal to the judgment. As this was evidently a mere clerical error in transcribing the execution, which was in evidence before the jury, it could have been amended in the court below, but no such amendment can be made here.

A still more fatal defect in the proceedings is the omission to make proof to the court, who were the sureties of the sheriff. They were not parties to this motion, which is alone against the sheriff, and to authorize the court to render a judgment against them, the fact should have been proved to the court, that those against whom the judgment was rendered as such, were his sureties, and the record must show that this was done. [Gary v. Frost & Dickinson, 5 Ala. Rep. 638.]

An agreement has been entered into by the parties, that if the court below could amend this judgment *nunc pro tunc*, from the fact that the bond of the sheriff was on file in the clerk's office, with these persons as his sureties, it shall be considered as amended here, but we are clear in the opinion no such amendment can be made. The defect in this judgment is, the omission to state that a fact was proved which alone could give the court jurisdiction to render a judgment against them. The existence of this conclusive evidence of their suretyship in the clerk's office, only shows that the proof could have been made, but to authorize such an amendment, it should appear by matter of record that such proof was made, though omitted to be stated in the entry of the judgment.

It remains to be considered whether, under the facts alleged in the notice, that a demand was made by the plaintiff, it was competent to prove a demand by the attorney of record of the plaintiff. We consider that this averment

would be satisfied by proof of demand by the attorney of record. A payment to him by the sheriff, would be conclusive against the plaintiff, and it necessarily follows, that he had the right to demand payment, and that a demand by him is in law a demand by the plaintiff.

For the error previously noticed, the judgment must be reversed, and the cause remanded.

HIGHTOWER, ET AL. V. KENNEDY, ET AL.

1. Upon an order in chancery overruling a demurrer to a bill, leaving the cause to be proceeded in to a hearing, according to the practice, a writ of error will not lie under the third section of the act of 1846, "relating to judicial proceedings," or any other enactment; but the defendant must await the rendition of the final decree before he can thus bring up for revision the decision of the demurrer.

Error to the Court of Chancery for Lauderdale.

L. P. WALKER, for the plaintiffs in error.

J. E. MOORE, for the defendants.

COLLIER, C. J.—The plaintiffs in error filed their bill against the defendants, to which the latter demurred, and their demurrer being overruled, they have prosecuted a writ of error. We have repeatedly held, that a writ of error will not lie upon an interlocutory decree, while the cause is still pending in the primary court, and unless the act of February, 1846, requires a departure from these decisions, we must repudiate the cause. The third section of that statute to which we have been referred, enacts, "that when the judge or chancellor holding a court, shall be of opinion that it will

facilitate the business, or diminish expenses of litigation, he may take up and decide any question of law arising upon demurrer in any cause, before the same is ready for final trial upon the evidence therein." This provision certainly effects no change in the law; for it was always competent for a court of law, in its discretion to dispose of a demurrer to the pleadings, without requiring the parties to announce that they were ready with their evidence for the trial of the issue of fact, should one be made up. And in respect to a suit in chancery, it was necessary that a demurrer to a bill should be disposed of before the parties could take testimony. So that of necessity, the parties cannot, when the demurrer is called for argument, be ready for a hearing "upon the evidence," unless the only evidence relied on be the answer and exhibits, which latter may be proved *ore tenus* at the hearing.

But if the section we are considering is effective for any purpose, its operation must be confined to the primary court, and can neither extend or limit the jurisdiction we are permitted to exercise. Upon this point, it seems to us there is no ground for controversy; for there is nothing to indicate that the legislature intended to secure to either party the right of a revision upon overruling a demurrer merely. The writ of error is consequently dismissed.

HUGHES v. RINGSTAFF.

1. Where a guardian is cited to appear and state his account for final settlement, and omits to do so, it is the duty of the judge to state the account, and cause notice to be given to the guardian, that unless he appears at the next orphans' court, and file his account and vouchers for settlement, then the account of the judge will be reported for allowance and settled. It is

error to state the account and allowance at the same term, and it makes no difference that the guardian is present when the account is settled by the judge and contests its items.

2. *Quere?* Whether the guardian will be permitted to contest the items in the account stated by the judge, when he is in contempt by refusing to state the account himself.
3. *Quere?* Whether a guardian can be cited to a final settlement by his ward before majority, without having been removed from the trust; and also, whether on either annual or final settlement, the sum found due to the ward can be decreed to be paid to the register of the court.

Error to the Orphans' Court of Lowndes.

HUGHES was cited by the orphans' court, as the guardian of Flora Ann Ringstaff, to appear and show cause why he should not make a final settlement of said ward's estate. The citation issued 16th February, 1844, and is returned executed.

In the judgment entry it is recited, the proceedings were had at the instance of one Mitchell, guardian *ad litem* for the minor, as well as that the parties appeared by their attorneys. It is further recited, that the defendant having failed to file his account, with vouchers for settlement, the court, on the motion of the plaintiff, stated an account, charging the defendant with such amounts as appeared to have come to his hands. He was charged as guardian with the sum of \$2,904 65 cash, in former guardian's hands, with interest from the 3d of October, 1837 to 10th February 1844, which was returned in a settlement previously made with the orphans' court. The defendant filed his exception, denying this charge. Issue was then joined between the parties, and a witness proved on behalf of the plaintiff, that the defendant said to him he had made a settlement with Measles, the former guardian, and had received from him what was due to his ward. No other evidence was introduced, nor other objection made to the account. The court was satisfied with the evidence, and allowed the charge. It also ascertained the balance due to the ward to be \$1,116 '08. Whereupon

it was ordered, that Flora Ann Ringstaff have the sum of \$1,110 08, with interest from the 15th February, 1844, and that the defendant pay the same over into the hands of the register of the orphans' court.

The defendant sues out this writ of error, and here assigns—

1. That it was error to state an account and report it for allowance at the same term of court, and in proceeding in the settlement at the same term.

2. That the proof was insufficient to authorize the judgment.

BOLLING, for the plaintiff in error, on the first point called the attention of the court to the statute, Digest, 230, § 28, and on the second, cited *Watson v. Byers*, 6 Ala. B. 393.

N. Cook, contra, insisted, the appearance of the guardian, and his contestation of the account stated, must be considered as waiving the statutory notice; and this the more especially, as no request was made to delay the cause. The proof of the sum due is ample, as it consisted of his return, as well as the admission that what was due from the former guardian was collected.

GOLDTHWAITE, J.—1. The statute of 1843, is very precise in directing the course to be pursued when an executor, administrator, or guardian, is cited to appear and file his account and vouchers for settlement, and fails to obey the citation. The judge, upon such failure, is authorized to state the account, charging the party with such amounts as shall appear to have come to his hands. The judge is then to cause notice to be given to the executor, &c. that unless he appear at the next term of the orphan's court thereafter, and file his account and vouchers for settlement, the account so stated by the judge will be reported for allowance, and settled as required by law. A proviso to the act directs, that if the executor, &c. at any time before the final decree upon the account stated by the judge, shall appear and file his accounts and vouchers for settlement, and shall pay such costs

as may have accrued, the proceeding had in relation to the account stated by the judge shall be set aside, and the court is then to proceed to settle with the executor, &c. according to the general law. [Dig. 230, § 48.]

It is obvious from this enactment, that the guardian is entitled to notice that an account has been stated, by the judge, and it seems also, his appearance when the judge is stating this account, cannot relieve the court from its duty to give the statutory notice, or preclude the party from insisting upon the notice. It appears here, that the account was stated at the same term at which it was finally decreed. In this we think the court erred, and for this error the judgment must be reversed.

2. Upon the question raised on the evidence, we should incline to think it sufficient, even in a condition of things which would allow the guardian to controvert the charge, but it deserves consideration whether the party in contempt by refusing himself to state an account, will be permitted to contest that stated by the judge under the provisions of the statute just quoted.

3. There is another matter in this cause, to which it is proper to call attention. The guardian is cited to a final settlement with his ward, who is described in the record as still being a minor, and there is nothing to show the guardian has been removed from his trust. Under these circumstances, it certainly admits of question, whether a final settlement can be made, and more especially, whether there is any warrant to decree a sum due to the ward, to be paid to the register of the court, whether the decree is on an annual or final settlement.

Judgment reversed and cause remanded.

POND, ET AL. V. LOCKWOOD, ET AL.

1. A defendant in chancery has the right at any time before the final hearing, to have a decree *pro confesso* set aside upon filing a full and complete answer. This right will not be lost, because the defendant had previously made an ineffectual effort to set aside the decree *pro confesso*, upon an insufficient answer.

Error to the Chancery Court at Montgomery.

BILL filed by the defendants, against the plaintiffs in error, and a judgment *pro confesso* rendered against them for failing to answer. When the cause was called in its order, the complainants moved for a decree on the bill, which had been previously taken as confessed. The defendant moved to set aside the order *pro confesso*, and offered to file what he supposed to be a full and complete answer. The chancellor was of opinion that the answer was not full and complete, and refused to set aside the order, and to give time to file the answer. On the third day of the term, and before the final decree was rendered, the defendant renewed his motion, and offered to file a full and complete answer, which was refused upon the ground that it was irregular, and inadmissible if the first application was properly rejected.

A final decree being rendered, the defendants prosecute this writ, and assign for error the refusal of the chancellor to permit the answer to be filed.

T. D. WILLIAMS, for plaintiffs in error, cited 9 Ala. 179.

ORMOND, J.—In our judgment the chancellor erred, in refusing to permit the answer in this cause to be filed. The reason assigned by the chancellor is, that he had refused at a previous day of the term to set aside the decree *pro confesso*, and permit an answer to be filed, and he seems to have considered, that this precluded the defendants from afterwards

filing an answer. The statute is peremptory, and declares, that "in all cases, before the hearing of the cause, the defendant shall have leave to set aside the order *pro confesso*, by filing a full and complete answer." The fact, then, that the respondents had previously been refused permission to file an insufficient answer, was no reason for refusing afterwards to permit a full and complete answer to be filed, before the hearing of the cause. This right is explicitly, and in terms secured to the defendants, and the chancellor has no discretion to refuse the permission. What effect the filing of an answer would have, to delay a cause, when it was postponed until the cause was ready for a hearing, we need not now consider—the right to file the answer at any time before the hearing, is clear.

For this error the decree must be reversed, and the cause remanded for further proceedings.

WADDEL v. GLASSEL.

1. Contract between the parties by which the *principal duty was to be performed by A. G.* (the defendant) in favor of J. W. W. (the plaintiff,) concludes and is subscribed as follows: "In testimony of which, we have hereunto annexed our respective signatures, this 30th day of April, A. D. 1841. J. W. W. [L. S.] A. G." *Held*: That this was not a sealed instrument previous to the act of 1839, and that, that statute had not made it such; that to constitute a writing under seal, it should *import upon its face* that the parties thus intended to execute it. Such an indication might be made by the usual conclusion, "witness our hands and seals," &c. and perhaps by a scrawl set opposite the names of all who subscribed the instrument, with the word *seal* or the letters *L. S.* written therein.

Writ of Error to the County Court of Sumter.

THIS was an action of assumpsit at the suit of the plaintiff

against the defendant. On the trial, the plaintiff offered to read to the jury a written contract between the parties, which is described in the declaration. This contract concludes and is subscribed as follows, viz: "In testimony of which, we have hereunto annexed our respective signatures, this 30th day of April, A. D. 1841.

ISAAC W. WADDEL, [L. S.]
AND'W GLASSEL.

Test: *Jno. R. Larkins.*"

To the introduction of this writing as evidence, the defendant objected, on the ground that it was a sealed instrument, which objection was sustained, and the writing excluded. Thereupon the court charged the jury, that the plaintiff had failed to make out his case by proof. To all which the plaintiff excepted, &c.—a verdict and judgment were accordingly rendered for the defendant.

J. HAIR and HOIT, for the plaintiff in error, made the following points: 1. To make a sealed instrument, the intention should appear in the body of the writing, and a scrawl should be placed opposite to the names of the parties signing. [Minor's Rep. 187, 421; 4 Ala. Rep. 140.] 2. The letters L. S. in a scrawl, if nothing else appears, will not make a seal. But if this made the paper a writing obligatory as it respects the plaintiff, there is no proof that the defendant adopted his seal. [1 Phil. Ev. 416; 9 Johns. Rep. 285; 7 Gill & J. Rep. 284; 2 Dev. Rep. 493; 2 Port. Rep. 58.]

S. W. INGE, for the defendant. The writing excluded from the jury is a sealed instrument without the aid of the act of 1839. [Minor's Rep. 187; 1 Wash. Rep. 56; Clay's Dig. 138; 3 Ala. Rep. 145; 4 Id. 140; 7 Id. 351.] The seal opposite the name of the plaintiff may be considered the seal of the defendant also. [2 Port. Rep. 54; 9 Johns. Rep. 285; 3 Phil. Ev. C. & H. Notes, 1280.]

COLLIER, C. J.—Previous to the act of 1839, the contract declared on would not have been recognized as a sealed instrument as to either the plaintiff or defendant; because

the writing did not contain a recognition that the scrawl set opposite the name of the plaintiff was intended to be the seal of either party. [Minor's Rep. 187.] The act referred to enacts "that all covenants, conveyances, and all contracts in writing, which import on their face to be under seal, shall be taken, deemed and held to be sealed instruments, and shall have the same effect as if the seal of the party or parties were affixed thereto, whether there be a scrawl to the name of such party or parties or not." Clay's Dig. 138.

Taking this statute in connection with the case cited from *Minor*, and we think it is clear that the agreement in question was not under seal. To give to it such a character, it should *import upon its face* that the parties thus intended to execute it. This is most usually indicated by the conclusion of a writing, which recites that the parties have subscribed their names and affixed their seals; "witness our hands and seals," &c.

We will not say that without such a recognition in the body of the writing, it cannot be a sealed instrument. If a scrawl was placed opposite the name of each of the contracting parties, and the letters "L. S." or the word "seal" written therein, perhaps that dignity would be imparted to it. But where the contract is silent in respect to the intention of the parties to seal it, and a scrawl with the letters "L. S." inserted in it, is placed opposite the name of the party in whose favor the principal duty is to be performed, the legal construction of the writing will not authorize it to be treated as a sealed instrument.

If the statute of six years had run, could not the defendant avail himself of it, as a bar, or would the statute of sixteen years, the limitation to actions on specialties, apply. We think most certainly the former, as the defendant did not employ a seal for himself, and there is nothing on the face of the paper to show that he adopted for himself the scrawl of the plaintiff.

In no view in which the question arising upon the record has presented itself to us, can the ruling of the circuit court be supported—its judgment is therefore reversed, and the cause remanded.

BURT, use, &c. v. HUGHES.

1. When a credit indorsed on a note is erased before the assessment of damages by the clerk, on a judgment by default, the party is not entitled to a *supersedeas*.
2. And it is error upon such a showing to amend the judgment entry *nunc pro tunc*. The duty of the clerk is to enter the judgment according to the note, and if entered for more or less than the proper sum, it may be corrected, but if a credit is erased before judgment, the court cannot set up the erased credit.

Writ of Error to the Circuit Court of Benton.

SUPERSEDEAS, by Hughes against Burt, suing for the use of one Findley.

The petition sets forth that Burt, at the fall term of the circuit court of Benton county, for the year 1843, recovered a judgment by default against Hughes, for \$160, besides costs. When the writ in that suit was served, the cause of action indorsed was a note for \$119, due 17th, July, 1839, and a credit was stated on it of \$54 90, as of the 19th November, 1842. Not choosing to enter a defence to the suit the petitioner allowed judgment to go by default, presuming the credit would be deducted from the sum of the note. Instead of this however, after it was ascertained no defence would be made, the plaintiff procured the attorney bringing the suit, to erase the credit from the note, and thus the judgment was entered for the full sum of the note. Burt, the nominal plaintiff is alledged to be entirely insolvent, and Findley is pressing execution for the entire amount of the judgment.

At the return term of the *supersedeas* the defendant in the original judgment, moved the court to correct the judgment *nunc pro tunc*. The judgment entry recites, "that it appeared from an inspection of the record, that the defendant is justly entitled to a credit of \$54 90, which is indorsed on the back of the writ as having been paid to the plaintiff, and

credited on the back of the note, 19th November, 1842. Thereupon the court directed the proper judgment to be entered *nunc pro tunc*, for \$107 47.

We learn from a bill of exceptions allowed at the hearing of this motion, that the plaintiff moved the court to dismiss the *supersedeas*, which the court refused.

The defendant then moved to correct the judgment of the previous term, and the only proof offered by him was the indorsement of the cause of action on the writ. The plaintiff thereupon offered to prove by parol, that the credit on the note sued upon was erased by the plaintiff's attorney after the commencement of the suit, by the request of both plaintiff and defendant. This proof was rejected on the ground of its being parol, and the court further refused to hear any parol proof from the plaintiff. It was admitted the note and the credit upon it were correctly described in the indorsement on the writ.

The plaintiff excepted to the ruling of the court, and now assigns—

1. The court erred in refusing to dismiss the *supersedeas*.
2. In setting aside the judgment of the previous term and entering another on the proof disclosed by the record.

S. F. RICE, for the plaintiff in error, insisted—

1. *Supersedeas* is the substitute for *audita querela*, and can be sued out only for matters arising after final judgment. [Lockhart v. McElroy, 4 Ala. Rep. 572; Stinnet v. Bank at Mobile, 9 Ib. 120.]

2. A judgment by default is the admission of the cause of action stated in the declaration, and has no reference to the writ. When judgment is entered in conformity with the declaration, it cannot be afterwards, at another term, changed or altered. [McGehee v. Greer, 7 Porter, 537; State Bank v. Johnson, 9 Ala. Rep. 367.]

3. If however, the subject is one of inquiry after judgment, and the court can institute an examination of the fact of credit, the plaintiff should have been permitted to show the credit was erased by mutual consent. This he could have done on a trial, and certainly he has the same right without one. If the fact is as the plaintiff proposed to show, then

the defendant is taking advantage of his own wrong. [Lockhart v. McElroy, 4 Ala. Rep. 572; Givens v. Lawler, 9 Ib. 543.]

T. A. WALKER, contra, argued—

1. Our statutes provide, that any mistake may be amended, (Dig. 321, § 50,) and under these and similar statutes, the right of amendment has been often exercised. [Merchants' Bank v. Minthorne, 19 Johns. 244; Wilkerson v. Goldthwaite, 1 S. & P. 159; Brown v. Bartlett, 2 Ala. Rep. 29; Fuqua v. Carvill, Minor, 170; Clements v. Judson, Ib. 395; Draughan v. Tomb. Bank, 1 Stew. 66; Allen v. Bradford, 2 Ala. Rep. 281.]

2. The court properly refused parol proof to contradict the record. [15 John. 318; Thompson v. Miller, 2 Stew. 470; Armstrong v. Robertson, 2 Ala. R. 164.]

GOLDTHWAITE, J.—1. It seems there was no judgment rendered in the court below, on the petition for the *supersedeas*, and for this reason the writ of error would be premature, if the court had not also proceeded to correct the judgment rendered at the previous term. As the case however, is before us, in all its aspects, we shall proceed to determine the questions arising on the record.

In Lockhart v. McElroy, 4 Ala. Rep. 572, we considered out statutory writ of *supersedeas* as standing in the stead of the common law writ of *audita querela*, but the claim of the petition in this case goes much further than that writ was ever held to extend. In Viner's Abridgement—title *Audita Querela*, E—it is said the writ will lie only to present some matter of defence which the party could not plead to the suit when in progress. Here the attempt is to set aside a judgment, for a matter of payment which the party could have pleaded. In this view of the case, it seems clear the party could have no relief at common law, by the old writ of *audita querela*, and therefore is not entitled on this ground to a *supersedeas*.

2. But it is said there is another aspect in which the party is entitled to the writ, or to a judge's order to delay or stay the execution; and that is, because the clerk improperly en-

tered the judgment for too much, by omitting to reduce the sum of the note by the credit indorsed. If the case was one of mere clerical misprision, there would be great force in this argument, but the petition shows the credit was erased before the entry of judgment. Under the statute which authorizes the clerk to make an assessment of the damages in certain actions upon default, &c., if a mistake is made by him in the sum of the judgment, whether he makes it too much or too little, the court may correct it *nunc pro tunc*. [Merchants' Bank v. Thorne, 19 John. 244, and several cases in our own court cited in defendant's brief.] But we are not aware of any adjudications which warrant the court in setting up a credit which is erased previous to the delivery to the clerk to assess the damages. Such an inquiry would be an investigation of the contested claims of the suitors, and as well remarked, would be the very matter which should have been in issue.

Whatever relief the party is entitled to, we are clear that *supersedeas* is not his proper remedy. [White v. Harris, 5 Hump. 421.] We think the court erred in amending the judgment, under the circumstances disclosed, and that the petition should have been dismissed.

Judgment reversed and remanded.

OLIVER v. HOLT.

1. A continuous running account, between the same parties, is an entire thing, not susceptible of division, the aggregate of all the items being the amount due, and therefore a recovery of a part by suit, will bar an action for the residue. The rule applies to a physician's account, who having sued for and recovered a part, cannot maintain an action for the residue of the account.

Error to the Circuit Court of Montgomery.

ASSUMPSIT by the defendant, against the plaintiff in error. The declaration is in the usual form, upon a physician's account.

The defendant pleaded a former recovery before a justice of the peace for \$37 50, for not performing the same identical promises and undertakings in the declarations, which he has since paid, &c.

The plaintiff replied that the recovery before the justice, was not for the non-performance of the promises and undertakings in the declaration mentioned, but for the non-performance of other and distinct promises and undertakings, &c. wherefore, &c. The defendant rejoined, re-affirming the facts alledged in the plea.

The jury found a special verdict, that the defendant became indebted to the plaintiff for medicine, and medical attention, in the sum of one hundred and sixteen dollars, and that after the contracting of this indebtedness, and after it became due, the plaintiff brought an action before a justice of the peace, upon a medical account, and recovered in said action, before said justice, between \$30 and \$40, which judgment remains unreversed. That the items specified in the account tried before the justice of the peace, are distinct and different from those sued for in this action. That some portion of each account was made the same year.

Upon these facts, the court rendered judgment for the plaintiff for \$116, which is the matter now assigned as error.

A. MARTIN, for the plaintiff in error.

The judgment of the court below is erroneous. An account due is an indivisible demand, and but one cause of action. [Lock v. Miller, 3 Stew. & P. 14; De Sylva v. Henry, 3 Porter, 132; Bendernagle v. Cocks, 19 Wend. 207.]

A non-prosecution of a suit to judgment upon a part of an account, the whole of which is due, is, while that judgment is unreversed, a bar to a subsequent suit on the balance of the account. [Guernsey v. Carver, 8 Wend. 492; Stevens v. Lockwood, 13 Wend. 644; Colven v. Corwen, 11 Wend. 557;

Bunnell v. Pinto, 2 Conn. R. 431; Avery v. Fitch, 4 Conn. R. 362; Lane v. Cook, 3 Day, 255; Markham v. Middleton, 2 Strange, 1259; 3 Phil. Ev. 842, n. 592, and authorities cited above.]

The judgment of the court does not correspond with the finding of the jury.

ELMORE, contra.

1. Under the issues, the plaintiff could show that the matters in this action were not included or submitted to the jury in the former suit.

2. When the court could pass on the whole if submitted, or when they might have been proved under the form of action, the presumption is that they were submitted, but this can be rebutted by proof. [Snider, et al. v. Croy, 2 Johnson, 227; Phillips v. Berick, 16 Ib. 136; Badger v. Titcomb, 15 Pick. 409; Sedden v. Tutop, 6 Term, 607.]

3. And if not submitted in fact, is no bar, unless under an entire contract, and the verdict of the jury has found the issues in favor of plaintiffs; and the record shows that the two demands were distinct and not embraced, and could not have been submitted in the trial before the justice. One test is, could the same evidence sustain both actions? [Snider, et al. v. Croy, 2 Johnson, 230; Brockaway v. Kreisy, 2 Johns. 210; Eastman v. Cooper, 15 Pick. 276; Sedden v. Tutop, 6 Term, 608; Weaver v. Cowles, 2 Robinson Va. 438; Young v. Manby, 4 M. Selwin, 184; Rex v. Shuff, 1 B. & Adol. 672; Smith v. Whiting, 11 Mass. 445.]

4. On the finding of the jury, the court pronounced the proper judgment. [See cases *supra*.]

ORMOND, J.—The writ in this case was sued out on the 30th January, 1843, and the judgment rendered by the justice of the peace which is pleaded in bar, on the 8th February afterwards; it is therefore a just inference, that the action was commenced before the justice before this suit was instituted. It has been argued on that hypothesis, and we shall so consider it.

The facts as found by the jury, establish that there was a running account between these parties for services rendered

by the plaintiff as a physician, and that the entire account was due when the action was commenced before the justice of the peace. The question then presented by the record is, whether a suit, and recovery of judgment, for part of an account, is such an abandonment of the residue, that no action can afterwards be maintained for it. This is a different question from that which arises when a former recovery is relied on, because in a previous action between the same parties, the same matter was put in issue, and was, or might have been passed upon by the jury.

The case of Seddon v. Tutop, 6 Term Rep, 607, is a leading authority upon this subject. There the plaintiff counted on a promissory note, and also for goods sold and delivered, and obtained a judgment. He afterwards brought suit for the goods sold, and the court held that the former recovery was *prima facie* evidence that the plaintiff's entire demand had been submitted to the jury, but that he could show that it was not, and that in fact no evidence whatever was submitted to the jury upon the demand then sought to be enforced. Lord Kenyon distinguishes the case from one, where a party suing on a single demand, fails to make proof of a part, in which event the verdict would be a bar to another suit for the portion of the demand which the plaintiff failed to recover in the first suit. This principle has been frequently recognized in this court.

In this case, the jury have found, that the items composing the account recovered before the justice, are separate and distinct from the items of this account; it is clear, therefore, that this matter was not, and could not have been passed upon by the justice of the peace, and the only question is, whether a running account is such an entire thing, that it is not susceptible of division, and that therefore a recovery in a suit instituted for a part, will bar a suit for the residue. Such is our opinion. A continuous running account between the same parties, is an entire thing, not susceptible of division, the aggregate of all the items being the amount due. If this is not so, then each item of which the account is composed is a separate debt, for which the party may sue. An account may doubtless be composed of items independent of, and

having no necessary connection with each other, as an entire continuous dealing, and in such a case, although if the items be of a similar nature, they may be combined in one action, the party may if he thinks proper bring separate actions on each, the only remedy for which would be an order to consolidate them.

In the *King v. the Sheriff of Herefordshire*, 1 B. & Ald. 672, separate actions were brought by a common carrier in the county court, for carrying goods at two several times, each of the actions being for £1 4s. A motion was made in the King's Bench for a prohibition, upon the ground that but one suit could be maintained. The rule was refused, Lord Tenterden remarking, that they were distinct debts, and did not come within the rule of law prohibiting the splitting of actions.

This rule of law, that a demand not divisible in its nature, cannot be split up into several causes of action, has been recognized by this court in two cases, *Lock v. Miller*, 3 Stew. & P. 14, and *De Sylva v. Henry*, 3 Porter, 132. A consequence of this rule is, that a judgment in a suit for a part of the claim, is a bar to an action for the remainder. This results necessarily from the entirety of the contract; being incapable of division, so as to be the foundation of several suits, a recovery of a part, is an election to take that for, and is therefore equivalent to, a recovery of the whole.

This principle has been asserted in a great many cases. *Guernsey v. Carver*, 8 Wend. 492, was an action for goods sold and delivered upon an account, consisting of distinct items, delivered on different days, but all due. It was held to be an entire demand, and that a recovery for a part was a bar to an action for the residue. The question again underwent an elaborate examination in the case of *Bendernagle v. Cocks*, 19 Wend. 207, where most of the adjudged cases are analyzed, and the principle sustained and re-asserted. The same doctrine is asserted in *Bunuel v. Pinto*, 2 Conn. 431, and in *Lane v. Cook*, 3 Day, 255. So in *Ingraham v. Hale*, 11 S. & R. 78, it was held that an entire demand could not be separated, by the assignment of a part to another, so as to authorize more than one suit upon it.

Modifications of the rule may be found in some cases,

which seem to invade this principle; but the rule itself is, we believe, universally recognized, and indeed the only question would seem to be, whether a continuous running account, is an entire thing, or whether each item of which it is composed is a separate debt. That it is an entire thing, is expressly decided in many of the cases referred to, and on principle it would seem difficult to attain any other conclusion.

The facts found by the jury, bring this case fully within the principle. It is an action on a medical account which was due when the suit was commenced before the justice of the peace. Like a merchant's account, it consists of a connected series of dealings between the parties, the aggregate sum at the close of the dealings, or when the account is closed, being the amount due. It can make no difference that the judgment was not rendered by the justice, until after this suit was commenced. Having been commenced before this suit, and being reduced to judgment, no other action can be maintained for the same demand.

Reversed and remanded.

CAWTHORN v. KNIGHT, GUARDIAN, &C.

1. The parties in whose favor executions are required to be issued by the act of 1830, on a decree of the orphans' court, for the final settlement of the accounts of executors, administrators and guardians, are upon the return of "no property found," entitled to executions *in their own names* against the sureties of the defendant in the decree.
2. The courts, in virtue of their power over process issued by them, or their officers, without the aid of legislation, may amend a execution by striking therefrom the name of a person who is improperly joined as a defendant with several others, without impairing its validity as to those against whom it should have issued.

Writ of Error to the Orphans' Court of Henry.

THE facts of this case may be thus condensed. On the 17th October, 1845, a writ of *fieri facias* tested of the preceding day, was issued from the orphans' court in favor of the appellee against Moses K. Speight, Stephen Cawthorn, Wm. Cawthorn, Wm. Armstrong, executor of John Jones, who was executor of Geo. Jones, deceased, for the sum of \$1,453 58, besides costs, which was levied on property in the possession of Stephen Cawthorn. Speight, one of the defendants in execution, was appointed a guardian of the appellee's ward, on the 6th day of November, 1834, executed a bond as such guardian, with Stephen and Wm. Cawthorn, Wm. Armstrong and Geo. Jones, as his only securities. On the final settlement of the accounts of Speight, as guardian, a decree was rendered on the 23d June, 1845, against him by the orphans' court, in favor of Knight, (the appellee,) his successor for the sum expressed in the execution. John Jones was not an obligor in the bond, nor named in the decree of the orphans' court, though his name is included in the execution. Upon these facts, Stephen Cawthorn moved the court to quash the execution, which motion being overruled, he prayed an appeal.

Previous to the motion of S. Cawthorn, the execution was at the instance of John Jones, quashed so far as it concerned him; and his name was stricken out upon motion of the plaintiff in execution, made at the same time.

J. E. BELSER and J. BUFORD, for the appellant. There is no judgment in favor of Knight against the sureties in the bond, nor was the legal title thereto in him; consequently, execution upon the bond should have been in the name of the obligee for the use of the party interested. The bond is a joint and several obligation, and an execution thereon must issue against *one only*, or *all*, and not an intermediate number. [2 Bac. Ab. 696, 698; 7 Ala. Rep. 593.] Being quashed as to Jones, and his name stricken out, on Knight's motion, the execution was avoided *in toto*.

No counsel appeared for the defendant.

COLLIER, C. J.—The act of 1830. provides that all de-

decrees made by the orphans' court on a final settlement of the accounts of executors, administrators, and guardians shall have the force and effect of judgments at law, and executions may issue thereon, for the collection of the several distributive amounts against such executor, administrator, or guardian. [Clay's Dig. 304, § 42.] A subsequent enactment, of 1832, declares, that when such an execution shall be returned by the sheriff "no property found," as to a part thereof, or generally, execution shall forthwith issue against the sureties of such executors, administrators or guardians. [Id. 305, § 45.]

In the case at bar, it is distinctly shown, that previous to issuing the execution in question, a *fieri facias* had been issued and returned "no property found," against the estate of Speight, the former guardian of the ward; so that it was altogether competent to have proceeded against the sureties as the statute prescribes. The plaintiff in execution must be the party in whose favor the decree is rendered; for the execution is a consequence of the decree, and the return upon the execution which issued against the principal obligor, and must conform to them. The seeming incongruity of permitting an execution to issue in favor of any other person than the obligee, is relieved by the statute which declares its legal effect, and gives the summary remedy to the party to whom the money has been adjudged. Such has been the unvarying construction placed upon the act.

John Jones it seems was the executor of Geo. Jones, a deceased obligor, and the question is, whether the insertion of his name avoided the execution *in toto*, or whether it was not amendable by striking out his name, without affecting its validity as it respects the other defendants.

It is said that a writ of execution may be amended for a misprision of the clerk, by the 8th Henry VI, ch. 12; but the statutes of jeofails do not extend to such final process. [2 Archb. Prac. 279.] The amount of the judgment stated in the execution may be amended. [2 T. Rep. 737; 5 John. Rep. 100.] A misnomer on a *ca. sa.* has been amended after it has been executed. [Barnes' Notes, 10; 4 Taunt. R. 322.] And even to strike out one of the names of the plaintiffs. [2 T. Rep. 737.] And an amendment has been allow-

ed so as to make the amount agree with the judgment, where it is variant. [1 Chit. R. 349.]

The amendment of a *ca. sa.* has been allowed by adding the *testatum clause*, (3 Johns. Rep. 144;) or where it issues for more costs than were awarded, (3 Caine's Rep. 98;) and an execution, if tested after the plaintiff's death, has been amended so as to make it conform to the truth of the case. [1 Cow. R. 33; 6 T. R. 368, 450.]

An execution made returnable by mistake to one county instead of another has been amended. [2 B. & P. Rep. 336; 1 Marsh. R. (Eng.) 237; 5 Burr. Rep. 2588.] Indeed it is very difficult to prescribe limits to this salutary power possessed by the courts, of permitting amendments in their process, whether *mesne*, or *final*. It is a power exercised for the promotion of justice, with no parsimonious hand; yet where its allowance would be destructive of the rights of innocent third persons, the court will scan well the grounds upon which its action is sought. See further, 1 H. Bla. R. 541; 1 W. Bla. R. 694; 2 Id. 836; 5 T. Rep. 577; 4 Taunt. R. 322; 5 Id. 606; 4 M. & S. Rep. 328; 3 Greenl. R. 20, 260; 1 Johns. Ca. 31; 11 Mass. Rep. 413; Coleman & C's Cas. 59; 3 Johns. Rep. 448; 9 Id. 386; 3 Murp. Rep. 128; 4 Ohio. Rep. 45; 4 Yeates' Rep. 185, 205, 483; 4 Dall. R. 267.]

Without stopping to inquire whether the present case is embraced by the enlarged and liberal provisions of our statute of amendment, it is perfectly clear that the cases cited, furnish an ample warrant for striking out the name of the party who was improperly joined as a defendant. The powers of courts over their process, independent of legislation, are sufficiently expansive to embrace such an authority. If necessary to sustain the amendment by some record or *memoranda*, the bond would show who were the sureties, and that *John Jones* was not one of them. As a reason for omitting the name of *Geo. Jones*, it would be allowable to suggest his death upon the roll *nunc pro tunc*, or to show the fact to the court in answer to a motion to quash. We think the recital in the *fi. fa.* that his executor was a defendant therein *was*

prima facie sufficient, if it was necessary to excuse its omission. The judgment of the orphans' court permitting the execution to be amended, and overruling the motion to quash, is therefore affirmed.

DOUGLASS, ET AL. V. TERRELL, TREASURER.

1. Where a motion is made by a county treasurer, under the statute, against a clerk for not rendering an account, the treasurer is a competent witness to prove the account was not rendered, as the motion is a county prosecution in which the officer has no interest.
2. In a motion by a county treasurer against a clerk of the circuit court for not returning on oath an account, &c. it is no defence that the plaintiff is not treasurer *de jure* if he is so *de facto*.

Writ of Error to the Circuit Court of Marion.

THIS is a proceeding by motion on behalf of Terrell, as treasurer of the county of Marion, against Douglass, as clerk of the circuit court, and others as his sureties, for his failure in that capacity, to return on oath, in writing, an account of monies received by him as clerk, to the county treasurer.

The defendants appeared to the motion, and pleaded—1. That said Terrell was not county treasurer. 2. Not guilty.

At the trial, the plaintiff offered evidence tending to show that Douglass had been elected and qualified as the clerk of the circuit court of Marion county; and proposed to prove by his own oath, that no return had been made by Douglass, of monies collected, &c. The defendants excepted to the allowance of this mode of proof, but the court overruled the exception.

The plaintiff then proved his appointment as county treasurer, in the year, 1843, and that he continued to act as such

down to the time of the motion. On cross-examination of plaintiff's witnesses it appeared, and the facts were so admitted, that in the spring of '44, the plaintiff was appointed to fill the vacancy in the office of clerk of the circuit court of Marion county, occasioned by the death of the then incumbent, and that he occupied the same, and discharged its duties until the election of another individual, at the election in August, 1844, and that during the whole time he performed the duties of both offices. It also appeared, that since that time he had not been reappointed to the office of county treasurer. The defendants offered no evidence to show that any return in writing had been made by Douglass, and there was proof that he had paid county claims to Terrell as treasurer.

On this state of proof the defendants requested the court to charge the jury, that the plaintiff was duly appointed clerk of the circuit court of Marion county, and that he accepted that office, and entered upon the discharge of its duties, then that the acceptance of that office vacated his office of county treasurer. This was refused, and the jury charged, that if the plaintiff had not been removed from the office of treasurer, while acting as clerk of the circuit court, but still continued to act as treasurer, no other treasurer having been appointed, then the fact of his holding and exercising both offices, was not a legal cause for the omission of Douglass to make report as required by law, of monies collected by him.

The defendants excepted to the refusal to charge as asked for, and to the charge as given. These several rulings of the court are assigned as error.

D. GOGGIN, for the plaintiffs in error, cited on the point that the plaintiff is an interested witness, 2 Starkie, 744 to 746. As to the main question, he insisted the acceptance of the clerkship vacated the office of treasurer. [Dig. 579, § 72.]

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. Although a suit of this description is usually conducted in the name of the person who

holds the office of county treasurer, yet it is really a prosecution at the suit of the county, and when a judgment is given it is for the use of the county, and the individual making the motion, has no pecuniary interest whatever in the prosecution. The statute imposes the duty as one that is official, and it admits of question if costs should be allowed, even if the motion fails. Without deciding more than the precise point involved, we think it clear the individual was properly allowed to testify that no return had been made to him as the treasurer. [Dig. 146, § 22.]

2. If the treasurer was suing for fees due to himself, as an officer, it might admit of question whether the defendant could not properly question his right to exercise the office, but when his acts in the office affect the rights of third persons, or of the county, we apprehend his title cannot be collaterally called in question. The statutes impose the duty on the clerks of the circuit and county courts, to make returns on oath to the county treasurer, and it is a matter of no importance to them who fills the office, so that it is actually filled, or colorably used. It is possibly true, the acceptance of a temporary appointment to fill a vacancy in the office of clerk of the circuit court rendered it incompatible for the same person to discharge the duties of county treasurer. [Dig. 579, § 22.] But until a successor was appointed in that office, or its vacancy established by some judicial proceeding, it cannot be asserted that the exercise of its functions by the plaintiff, was without colorable pretence. Being in the exercise of the office under color of title, it is the uniform current of decision, that his acts would be a protection to third persons, and that his title cannot be collaterally impeached. In Viner's Abridgement—title, Officer, G, 4—it is said the acts and grants of an officer *de facto* are good. In McGregor v. Balch, 14 Verm. 428, the attempt was to show a justice of the peace had no jurisdiction because at the same time he exercised the office of post master. The court considered the offices as incompatible, but decided the question could not be raised in a collateral issue. To the same effect is Mayo v. Stoneum, 2 Ala. Rep. 390; Morrow v. Brady, 7 Ib. 59; McInstry v. Fanner, 9 John. 135; People v.

Collins, 7 Ib. 549 ; Fowler v. Beebee, 9 Mass. 231 ; Backnam v. Ruggles, 15 Ib. 180.

If the acts of an officer *de facto* are good to protect third persons, the same principle will prevent a stranger from discharging himself from a duty by showing the office illegally or improperly filled, when his duty is to be performed.

We are satisfied the circuit court properly expounded the rule in this case.

Judgment affirmed.

MURPHY v. THE CITY COUNCIL OF MONTGOMERY.

1. The act of 1829, incorporating the Montgomery Wharf and Steamboat Company, did not confer any proprietary rights on the company, but merely authorized them to exact tolls on the landing of goods at their wharf.
2. The city of Montgomery, as an incident of its rights of property in a wharf, may collect toll or wharfage from those landing there, but from the interest the public have in the matter, the toll may be regulated by law.
3. The right to a franchise may be tried by an action of assumpsit for money had and received, by one usurping the franchise and collecting the tolls.

Error to the Circuit Court of Montgomery.

ASSUMPSIT by the defendant, against the plaintiff in error, for money had and received.

Upon the trial, as appears from a bill of exceptions, it was proved that on the 1st July, 1823, the town council of Montgomery, executed a lease of a site for a wharf to Goodhall & McGehee, which by a subsequent agreement was extended to the 1st January, 1845. This lease was afterwards conveyed by them to John Gindrat and others. The defendant

then read in evidence, an act of the legislature passed the 29th January, 1829, incorporating the said individuals by the style of the Montgomery Wharf and Steamboat Company, of whom Justus Wyman was one, and whose interest was purchased by the plaintiff in error, which interest he held on the 1st January, 1845, and retained possession thereof until 5th May, 1845, collecting wharfage and tolls, and that of the sum collected, near one thousand dollars was received by him before the 5th May, 1845. The charter of the town of Montgomery was also in evidence.

This being all the testimony, the court instructed the jury, that if they believed all the evidence, they must find for the plaintiff, the amount of money collected after the 1st January, 1845.

The defendant moved the court to charge, that the city council had no right to collect wharfage at any wharf in said city, and that if the defendant collected the money as wharfage, then the plaintiff could not recover.

This the court refused, and the defendant excepted to the charge given, and to that refused, and now assigns it as error.

BELSER, for plaintiff in error.

1. The city council of Montgomery could only exercise the powers given to it by the legislature, and the charter gives the corporation the right to *regulate* wharfage, not to *collect* it. [See act of incorporation of 1837, pp. 54-5-6.]

2. The right to collect wharfage was a franchise vested in the Montgomery Wharf and Steamboat Company by the act of the legislature of 1829, of which corporation the plaintiff in error was a member. [See act of incorporation of 1829, p. —; 3 Kent's Com. 5th ed. pp. 458-9; see 1 vol. Lom. Dig. 534-5.]

3. If the plaintiff in error collected the money as agent for the defendant in error, he was not liable to be sued until a demand of the money was made. [See Sally's Adm'r v. Capps, 1 Ala. 121.]

4. There is no count in the declaration for use and occupation, and a landlord cannot recover for use and occupation except on a count *framed* for the purpose. [See 1 Chitty's Plead. 342; 2 Saund. Rep. 350, n. 2.]

Murphy v. City Council of Montgomery.

5. The action for use and occupation does not lie except upon a demise, or when the relation of landlord and tenant exists. [See *Bell v. Ellis' Heirs*, 1 Stew. & P. 294.]

6. The court could not presume a contract creating the relation of landlord and tenant, because the suit was brought before the expiration of the year 1845, and the wharfage was received under a title *adverse* to the defendant in error. [See 4 Kent's Com. 5th ed. 112; Chit. on Con. 370; 4 Phil. Ev. C. & H's Notes, 169; 1 Term, 159; 1 Raymond, 707; 11 Pick. 9; 6 Johns. 46; 1 Wend. 134.]

7. No general charge that "the one or the other party is entitled to a verdict is proper, when there is any conflict of proof." [See *Browning & Co. v. Grady's Adm'r*, at this term.]

ELMORE and J. D. F. WILLIAMS, contra.

1. Money paid under a mistake of law, by one but with a full knowledge of the facts, or with the means of such knowledge within his reach, cannot recover it back. [Clark v. Dutcher, 9 Cow. 674, 681; Ladd v. Kenedy, 2 N. H. 341; Jones v. Watkins, 2 Stew. 81.]

2. Where an agent collects money for his principal, upon an illegal contract, the principal and not the agent will be entitled to it. [Elliot v. Swartwert, 10 Peters, 137; Tenant v. Elliott, 1 Bos. & Pul. 3; Farmer v. Russell, 1 Id. 296.]

3. An implied agency may be created by the acquiescence of the principal in the acts of the agent. [Story on Agency, § 54.]

ORMOND, J.—The action is brought to recover money received by the plaintiff in error, to the use of the defendant, and the true question is, whether the wharf and steamboat company, or the city authorities of Montgomery, are entitled to the wharfage or toll paid for unlading at the wharf, since the 1st January, 1845.

It appears very conclusively from the evidence, that the title to the wharf is in the city of Montgomery, and that the possessory right of the company ceased on the 1st January, 1845. This appears from the lease executed by the city au-

thorities, which estops those claiming under it from denying the title of the city authorities.

It is however contended, that the act incorporating the Montgomery Wharf and Steamboat Company, which passed in January, 1829, secured to them the enjoyment of this franchise until 1849. The design of that act was to incorporate the individuals there named, and to authorize them, among other things, to exact certain tolls or rates of wharfage on all goods landed at the wharf at Montgomery. But it was not the design of the legislature to confer on the company proprietary rights in the soil, but only to give them the exclusive privilege of collecting wharfage on their own property. This is not left to implication, as the fifth section giving the power to collect wharfage, contains the following proviso: "Provided, always, that the said corporation shall have no right to receive wharfage, until they become possessed of the present wharf and landing in the said town, and *only during their continuance in possession of the same.*" It is therefore very clear, that when their right to the possession of the wharf ceased, as it did on the first January, 1845, their right also ceased to collect tolls there.

It is further urged, that the city council has no right to collect toll at this wharf, because there is no provision in its charter authorizing it to do so. We infer from the deed found in the record leasing this wharf to those under whom the defendant claims, that the title to the wharf is in the city, and such being the fact, it had the same right as any other proprietor, to collect wharfage from those landing goods there. This right resulting from its proprietary interest, is not a franchise, but a right of property. It is true, that as this is a matter which affects the public, the legislature may regulate its exercise, by declaring what tolls or wharfage an individual shall be allowed to receive; but this does not make the right a franchise, but is merely a restraint upon the exercise of one of the rights of property.

The customary mode in England of trying the right to an office, is by bringing this action for the fees collected by one who has usurped it, and by showing himself entitled to the office, he establishes his right to the fees collected during the usurpation. [Green v. Hewit, Peake, 182; Rex v. Bishop

of Chester, 1 Term, 403, and Powell v. Milbank, note to the same case.]

It is not however necessary to inquire, whether the right to the possession of the wharf, could be tried in an action for money had and received, for it appears that the possession was yielded to the city council on the 5th May, 1845; and it is then the naked case of one receiving money, which of right belongs to another, and which the law considers as having been received to his use, and implies a promise to pay on request.

From these considerations, it follows that the action is well brought, and sustained by the proof. Let the judgment be affirmed.

SPENCE, ET AL. V. RUTLEDGE, ADM'R, &C.

1. When the judgment entry recited that the plaintiff came by attorney, and "service being proved, and discontinued as to Elrod, on whom process was not served," it must be intended that the acceptance of the service of a writ as indorsed upon it, and subscribed by the defendants against whom the judgment is rendered, was shown to be genuine.
2. It is not necessary in declaring on a writing obligatory, to alledge that it was delivered to the obligee—delivery will be presumed from possession by him.
3. A specialty was made payable to M. H. and S. M., executrix and executor of J. H. deceased, and in a declaration thereon, R. (the plaintiff,) described himself as administrator *de bonis non* with the will annexed, &c. of J. H. deceased, unadministered by M. H. and S. M.—alleging that after the making of the writing obligatory, the executrix and executor were removed from the administration, and R. appointed in their stead: *Further*, that the writing being unpaid, was given over by the executrix and executor, as part of the unadministered assets of J. H.'s estate—of all which the defendant had notice, &c. *Held*, that after a judgment by default, it would be intended the writing was assets of the testator's estate, that M. H. and S. M. had been removed, and had delivered the same to R. as their successor, and that consequently he could maintain an action thereon.

4. Where in rendering a judgment by *nil dicit* or default, on a demand ascertained by writing, too much interest is salculated, the error will be corrected on motion, or in thy appellate court at the cost of the plaintiff in error.

Writ of Error to the Circuit Court of Talladega.

THIS was an action on a bill single, at the suit of the defendant in error, payable to "Margaret Hall and Samuel McClerkin, executrix and executor of the estate of James Hall, deceased." The plaintiff describes himself in the declaration as "administrator *de bonis non* with the will annexed of the goods and chattels, rights and credits of James Hall, deceased, unadministered by Margaret Hall and Samuel McClerkin;" alleges, that after the making of the said writing obligatory, the executrix and executor were removed from the administration of the testator's estate by the orphans' court of Talladega, and the plaintiff duly appointed in their stead by that court. It is further stated, that the writing declared on being unpaid, "was given over to plaintiff by the said executrix and executor as part of the unadministered assets of said estate—of all which defendants had notice," &c. The defendants having failed to appear, a judgment by default for the amount of the writing with interest, was rendered against them.

S. F. RICE, for the plaintiff in error, made the following points: 1. The declaration should have averred a delivery of the writing obligatory by the obligors. 2. It should also have been alleged directly and positively that it was part of the assets of the testator's estate—the allegation on this point is altogether insufficient. [6 Ala. Rep. 387; 9 Mis. R. 169.] 3. The process was not served by the sheriff, and proof of its acceptance was not such as to show that all the defendants against whom judgment was rendered were before the court. [9 Port. Rep. 425.] 4. The judgment is for more damages than the declaration will either authorize or sustain.

L. E. PARSONS, for the defendant in error. The judgment

entry shows that the acceptance of service of process by the defendants below was proved; but if this were doubtful, every intendment should be made in favor of it. [3 Stew. R. 444; 1 Ala. Rep. 80, 182, 205; 3 Id. 109, 632.] A judgment by default, is an admission of every allegation in the plaintiff's declaration and of his right to recover.

On a note payable to an administrator, the right of action follows the administration, and an administrator *de bonis non* may sue. [Minor's Rep. 206; 6 Ala. Rep. 387, 399; 7 Id. 478.] If the judgment by default, be for too much, it is an error which will be amended at the cost of the plaintiff in error.

COLLIER, C. J.—Both the defendants against whom the judgment was rendered, appear by indorsement on the writ to have acknowledged its service. The judgment entry commences thus—"This day came the plaintiff by attorney, and service being proved, and discontinued as to Elrod, on whom process was not served—and the defendants being called came not, but made default." We think it perfectly clear, from the recital, that as to all the defendants against whom process was issued, except him as to whom a discontinuance was entered, the service of the writ was proved.

It is not necessary, in declaring upon a writing obligatory, to alledge its delivery to the obligee; it will be inferred from his possession, that it was duly delivered, and if the reverse is true, it devolves upon the obligor to prove it, if it can avail him any thing.

In *King v. Green*, 2 Stew. Rep. 133, it was said that bonds and notes taken by an executor or administrator, for the estate of the testator, or intestate, which has been regularly sold, are to be "held by them, not in their own right, but as assets in the right of others. And hence, upon their death, resignation, or removal, such notes and bonds would pass to those intrusted with the further administration, as part of the estate unadministered." The case of *King and Clarke v. Griffin*, use, &c. 6 Ala. Rep. 387, is unlike the present. There the action was brought in the name of the payee of a promissory note, for the use of another person. The payee was described in the note as the sheriff and adminis-

trator of the estate of J. C., &c. A demurrer was interposed to the declaration, upon the ground that the beneficial plaintiff was shown to be the successor in the administration, and the suit should have been brought in his name. We said, "it has been repeatedly decided, that the assets which come to the hands of an administrator pass to his successor, if he dies, resigns, or is removed, before he administers them. Under the influence of this principle, the administrator *de bonis non*, becomes entitled to the bonds, notes, &c. which his predecessor had in his hands when his representative functions ceased." It was however decided, that although the payee may have held the note as the administrator of the intestate named in it; yet as it could not be assumed from the declaration, that the beneficial plaintiff succeeded him in that trust, the demurrer was rightly overruled.

True in the case before us, the declaration does not contain a formal allegation that the writing on which it is founded was assets in the hands of the obligees, but it is strongly intimated in *King v. Green*, that this is inferrible from what appears on the face of the paper. Be this however as it may, we think it is substantially alledged, that it was due to the obligees in their representative character, and upon their removal from the administration, passed to the plaintiff as their successor. Looking to the entire declaration, we think it so satisfactorily shown that the obligees are not without meaning designated as "executrix and executor," but it was intended to show the character in which they were contracted with, and were to receive the money. This being so, there is no difficulty in understanding why the writing was passed over to the plaintiff as part of the assets of the testator's estate. Let this view suffice to show, that the declaration is free from error. The clerk will compute the interest upon the cause of action, from the time of its maturity up to the rendition of the judgment in the circuit court, and if too much damages have been adjudged, he will make the appropriate correction as the statute directs, at the cost of the plaintiff in error; in other respects the judgment is affirmed.

SWAN v. THE STATE.

1. The term premises in the statute authorizing merchants and shopkeepers to retail spirituous liquors by the quart, so that the same be not drank with, &c. on the premises where they reside or have their stores, means something over which the individual has control; and therefore a conviction is proper when the liquor furnished is drank from glasses of the shopkeeper on a bench used by him in a mill yard some fifteen or twenty steps from the house where the liquor was sold.

Writ of Error to the Circuit Court of Sumter.

INDICTMENT against Swan for retailing spirituous liquors in quantities less than one gallon, and permitting the same to be drank on his premises.

At the trial, it was in proof that the defendant sold the witness one quart of whisky, which the purchaser took from the house of defendant to a work bench some fifteen or twenty steps from the house, and there it was drank, by the witness and some other persons, from glasses furnished by defendant, and in presence of defendant, who made no objection. The work bench was between the house of defendant and a mill owned by one Gay, and was on Gay's land, though the bench was then in use by defendant. The defendant kept goods and medicines in his house or store for sale. The defendant had no control over the land or yard where the work bench stood.

On this state of proof, the court charged the jury, that if the defendant sold the whisky, knowing the same was intended to be drank at the work bench spoken of, or at any other place near to his store, and furnished the glasses out of which to drink it, then the selling was a violation of the statute.

The defendant at a former day moved this court for a writ of error, on the ground that the court erred in this instruction, and the writ was allowed.

INGE, for the plaintiff in error.

ATTORNEY GENERAL, contra.

GOLDHWAITE, J.—The statute which prohibits the retailing of spirituous liquors except by licensed persons, permits merchants and shopkeepers to sell by the quart, so that the liquor be not drank with their consent and privity in their stores or on the premises where they reside or have their stores; (Dig. 554, § 4,) and the question is whether the proof in this cause brings the defendant within the terms and intention of the statute. It is evident the terms, *or on the premises where they reside or have their stores*, were intended to mean something different from that which had been previously expressed by *in their stores*, as without such intention, the terms are useless in the connection where they are found. In common parlance, the word premises is understood to mean something over which an individual has control, either by actual possession or by claiming and exercising the right to prevent the occupation by others, and in our judgment it is used in this sense by the statute. Applying this term to the evidence, we think the work bench must be understood as being a part of the premises where the defendant had his store, as the presumption from his use of it is, that it was under his control, at least so far as to warrant him in excluding mere strangers from its use. It seems to us for all the purposes of drinking, to have been *pro hac vice* as much his premises as a table within or adjacent to his place of doing business; and it seems was furnished with the necessary drinking vessels in the same manner a table would have been furnished if there used.

We are entirely satisfied the law was correctly ruled by the circuit judge. Judgment affirmed.

McBETH v. McBETH.

1. The orphans' court has the power to establish the contents of a will, which has been destroyed, without the knowledge or consent of the testator, by the proof of a substantial copy of the will.
2. If the will is not destroyed, but is in the possession of any one subject to the jurisdiction of the court, it should compel its production.
3. When a will is in the possession of the deceased, and is not found at his death, the legal presumption is, that he himself destroyed it, *animo revocandi*, until the contrary is shown.
4. The form of the probate of such a will, is, that it is established, until a more authentic copy can be brought in.

Error to the Orphans' Court of Pike.

THE plaintiffs in error petitioned the orphans' court, to admit to probate, a paper which they alledged to be the last will and testament of Walter McBeth. That he being of sound mind, and disposing memory, executed his last will, which was duly attested by the witnesses whose names are signed thereto, but the same has been lost or mislaid, so that they are unable to produce the original will for probate. Annexed is a copy of the alledged will, purporting to be signed by Walter McBeth, and attested by Malcolm Blue, John Blue, and John C. McBeth.

Upon the motion of the petitioner, a citation issued to John McBeth, and others, commanding them to produce to the court, the last will and testament of Walter McBeth, or show cause to the court upon oath, that such is not in their possession, control, or custody. Citations also issued to the next of kin.

The contestants appeared, and objected to probate of the paper, offered as the will of Walter McBeth, and tendered an issue to the petitioner, and [thereupon a jury was impanelled.

The petitioners then proved the execution of the will as

described in the petition, on the 24th March, 1844, and that the same could not be found amongst the papers of the deceased, or elsewhere since his death. That after the execution of the will, it was put into a pocket book, which was handed to Amanda McBeth, a daughter of the testator, who put it into a trunk, which was in a room occupied by the father and daughter, and which was the usual place of keeping his papers, and that all persons had access to the room. Walter McBeth, the father, was confined to his bed from October, 1844, until his death, in February, 1845.

Belinda McAskill, a witness, stated, that in December, 1844, she saw Amanda McBteh lock the pocket book in the clock. Malcolm and John Blue, two of the witnesses to the will, stated, that subsequent to the execution of the will, they called on the testator for a settlement, who directed his daughter, Amanda, to bring him his pocket book, which she did, and carried back, and deposited it in the presence of the testator.

Flora Blue testified, that some two or three weeks before the death of the testator, she asked him about the disposition of his property, to which he replied, that he had it fixed. He further said, we live in such a queer world, he was afraid they would pick a flaw in it, and in that, or some other conversation with witness, said he thought what Malcolm Blue, had done, would stand, and asked how he would dare to meet his wife, (mother of petitioners,) without complying with her dying charge. Witness did not recollect, whether he then stated what the charge was, but had heard him frequently say, that it was to give the negroes to her children. On cross examination, being asked whether she had heard him say he had made a will, said she did not. It was proved that the original will was written by Malcolm Blue.

Dr. McAlpin, the attending physician, testified, that six days before the death of the testator, he said that he had made a disposition of his property, and was satisfied to die, so far as regarded as his property. That this conversation was in allusion to his will, and that he was physically incompetent to destroy it, after this conversation.

The petitioners offered to prove the declarations of Amanda McBeth, showing her possession of the pocket book, but the

court excluded it as incompetent, and that said Amanda and her guardian had been duly notified to produce the will on the trial. It appears from the copy of the will offered, that Amanda is one of the legatees in the will. John McNeil, guardian of Amanda, came into court, and disclaimed all connection with the present suit, and stated that her interest was the same, whether the will was admitted to probate, or not.

Upon this proof, the court decided that the proof was insufficient to authorize the introduction of secondary evidence of the contents of the will, without further evidence of possession by the adverse party, and thereupon the court refused to permit the will to be proved, and dismissed the petition.

This matter is now assigned as error.

BURFORD, for plaintiff in error.

The orphans' court may establish and grant probate of a lost will, (3 Porter, 51,) and the evidence offered was sufficient proof of its loss. [2 Ala. 60; 13 Johns. 58; 8 Greenl. 417; 14 Wend. 619.]

BELSER, contra.

1. The admissions of Amanda McBeth, as to the custody of the pocket book, were properly rejected; because they did not tend to establish any part of the case. Besides, she had an interest in establishing a paper, to which others were objecting. But, if competent to testify, she should have been examined as a witness. [See *Derr v. Allen*, 1 Penn. 35; *Bank v. McDade*, 4 Porter, 253.] And her interest, under the will, could not be released or discharged by the assent of her guardian, whether by parol or otherwise. [See *Jackson v. Sears*, 10 Johns. 435; 4 Dess. 279.]

2. If a will be found canceled, the law infers a revocation. [See 4 Kent's Com. 531; *Colvin v. Fraser*, 2 Hagg Eccle. 266; *Ibid*, 191.] If a testator retains a will in his own custody, and it cannot be found after his death, the presumption is that he destroyed it himself, for to impute the destruction of it, without evidence, to another, without authority, would be presuming a crime. [See 1 Williams on Executors, 77; 4

Kent's Com. 531; Lillie v. Lillie, 3 Hagg Eccl. 184.] A will may be established, though the instrument itself cannot be produced; but this must be done on satisfactory proof that it was duly made and was not revoked by testator. For example, either by proving that the instrument existed *after* the testator's death, or that it was destroyed in his lifetime, without his privity or consent. [See 1 Williams on Executors, 409.]

3. In any view of the case, the testimony was insufficient to establish the probate of the will by secondary evidence. The will conveys real and personal estate. The three, or at least two of the subscribing witnesses to the will, if within the jurisdiction of the court, should have been examined to establish it, before the secondary evidence could be allowed. [4 Dess. 279; Chase v. Lincoln, 3 Mass. 236; Johnson v. Glascock, 2 Ala. 219.] The case in 7th Ala. was determined on a different state of facts. [See Couch, et al. v. Couch, 7 Ala. 519.]

ORMOND, J.—In Apperson v. Cottrell, 3 Porter, 51, the power of the orphans' court, to establish a will which had been destroyed by the testator, in a fit of insanity, was fully recognized. Nor indeed can any doubt be entertained, that the power of that court is fully adequate to establish a will, which has been lost or destroyed, when the will was in force unrevoked by the testator at his death, and that in such a case parol evidence may be given of its contents, and an authentic memorial made thereof in the orphans' court, or the truth of a copy offered as a substitute for the original established. In Trevelyan v. Trevelyan, 1 Phillimore, 149, a will destroyed without the knowledge of the testator, was established. Sir John Nicholl said, there can be no doubt in law, that if a will duly executed is destroyed in the lifetime of the testator without his authority, it may be established upon satisfactory proof being given of its having been so destroyed, and also of its contents.

In Foster v. Foster, 1 Addams, 462, a will had been destroyed by the testator's son. After his death, the fragments were collected, and such portions as were lost, restored from the memory of witnesses; and the court being satisfied that

the copy offered contained the substance of the will, established it.

To justify the court in establishing a will by secondary evidence of its contents, satisfactory proof must be produced of its loss or destruction. If it is in existence, in the possession of any one within the jurisdiction of the court, it should compel its production, to accomplish which our statutes invest the court with plenary powers. [Clay's Digest, 304, § 36.]

In this case, it is fully proved that the deceased executed his will in due form in March, 1844, and in our opinion the evidence also satisfactorily establishes, that during his last illness, and immediately preceding his death, he supposed the will to be in existence, and relied upon it as a testamentary disposition of his property.

The testimony of Flora Blue is full to this point. It is evident that she was an intimate friend of the family, possibly a relation, as we find her inquiring of the testator about the disposition of his property, and it appears he had talked with her on the same subject previously. He then informed her, that he had disposed of his property, in the manner he had promised his wife he would, and that he had reference to this will, is manifest from the expression, that he thought what Malcolm Blue had done would stand, but seems to have had a presentment, that efforts would be made to set it aside, or contest it. It is true, he does not in express terms say he had made his will, but he evidently intended to be so understood, and was so understood. The question, whether he had made a disposition of his property, was in effect asking him if he had made his will, and his answer that he had, conveys as precisely to the mind, the idea that he had made his will, as if he had responded in these words. What else could he mean by saying *he had fixed it*; that he has *afraid they would pick a flaw in it*; but he thought what Malcolm Blue had done would stand? It is impossible to doubt, that he referred to the will written by Mr. Blue.

This was but three weeks before his death; and but six days previous to his death, he tells his attending physician that he was satisfied to die so far as regarded his property, having disposed of it. This had doubtless reference to his

will, and was so understood by the physician. It is then very clear, that at this time he supposed the will to be in existence, and repels the presumption of a voluntary cancellation, or destruction of it, previous to that time ; and none can arise during the short period he survived.

In *Jackson v. Betts*, 9 Cow. 208, it is said, that if a will be once duly executed, and once an existing will, in the hands of the testator, unless there be evidence of its having been canceled or otherwise revoked, the law presumes its continued existence to the time of his death. If this be a sound exposition of the law, it ends this question, as there can be no doubt that the will was executed by the testator, and it would then devolve on those objecting to the probate, to repel the presumption by proving a revocation. But we understand the law to be, that where the will is left in the possession of the deceased, and is not found at his death, the legal presumption is, that he himself destroyed it, *animo revocandi*. [*Davis v. Davis*, 2 Addams, 223.] The judge adds, "this presumption however, may be repelled by evidence ; nor does it require evidence amounting to positive certainty, but only such as reasonably produces moral conviction." This question was again considered very elaborately, in *Colvin v. Fraser*, 2 Haggard, 266, and the same doctrine asserted.

In this case, it is however to be observed, that the deceased did not have the possession of the will, in the sense in which that term is employed in the cases cited. The rule itself rests on the fact, that no one has access to the will but the deceased. Such was the fact in *Davis v. Davis*, *supra*, where the will was kept in a trunk, in the room of the deceased ; and in *Colvin v. Fraser*, where it was kept in an iron chest, to which no one had access but the deceased, and it also appeared that he was sedulously careful of his important papers, locking his door when papers of importance were about. Here it appears, that when the deceased executed the will, it was deposited in a pocket book, which was kept in a trunk, in a room occupied by his daughter Amanda and himself, but to which as it seems every body had access ; and afterwards locked up by the daughter in the clock. This does not then appear to have been such a control over the

will by the deceased himself, as to cast on those asserting its continued existence, the necessity of explaining the manner or cause of its disappearance. The obvious effort in the orphans' court, was to charge some person with the fraudulent spoliation of it, and it would seem from the course of the examination, that an attempt was made to cast suspicion on Amanda, the daughter of the testator, who however does not seem to have had any interest in the matter, as it was stated by her guardian that she would receive as much under the will, as if her father was declared intestate.

There is no doubt however, that the will has disappeared, and as we infer from the statement in the record, the pocket book also in which the will was kept; and we think also the necessary inference from the declarations of the testator, a short time before his death, is, that he supposed it was then in existence, consequently did not by any act of his, destroy or revoke it.

It is certainly true, that the declarations of the testator should be received with great caution, as such declarations are frequently made for the purpose of misleading, and of stifling the importunity of relatives and friends. To entitle them to much weight, there ought to be intrinsic evidence of their sincerity, and such we think is the case here. The conversation with Flora Blue, has all the evidences of sincerity, and reality about it, which might be looked for where the object was not merely to parry, or evade a disagreeable subject, or to baffle impertinent curiosity. In such a case, we might expect he would satisfy the inquiry, or evade the subject by general declarations; but here there is that fullness of detail, and reference to persons and events, and also speculations of the probable conduct of those opposed to the will, as gives it all the appearance of reality, and attests its genuineness and sincerity.

The same remarks apply to the testimony of Dr. McAlpin. It does not appear that he has any interest or feeling in the matter. It appears, so far as we can judge from the statement of his testimony, to have been a voluntary statement of the deceased, and it is difficult to assign a reason for his wish to deceive his physician.

It is also to be observed, that no declaration of his could

deceive those about him, as the will was not in his personal custody, but was, as we must infer, where the members of the family had access to it. In the case of *Davis v. Davis, supra*, a lost codicil was established upon declarations certainly not stronger, or more probable than those detailed in this case.

The reason assigned by the court for refusing to permit evidence to be given of the contents of the will, that it was not sufficiently proved that the original was in the possession of the adverse party, proceeds upon an incorrect view of the power of the court to establish the contents of a will. If it was satisfactorily shown to be in the possession of the adverse party, it would be the duty of the court, as already remarked, to compel its production, and it is not until it is satisfactorily made to appear, that it cannot be produced, that the right exists to prove its contents; and then the form of the probate is, that it is established till the original, or a more authentic copy can be brought in. [*Davis v. Davis, supra.*]

Upon the whole we are satisfied that the testimony establishes that the deceased did make his will as alledged in the petition, that it was not cancelled or revoked by him previous to his death, that it is not in the power of the petitioners to produce the will for probate, and that they should be permitted to prove that the copy propounded by them, is substantially a copy of the last will and testament of the deceased.

Decree reversed and cause remanded.

MONROE v. EZZELL.

1. An ostensible partner may maintain an action in his own name, without joining a dormant partner, although the latter was known to the defendant when the debt was contracted, and actually sold him the goods, for the

price of which the action is brought : COLLIER, C. J. was, however, of opinion, that a partner who made himself known to the defendant at the time the debt was contracted, was not dormant as it respected the defendant, and should have joined in the action against him.

Writ of Error to the County Court of Sumter.

THIS was an action of assumpsit, at the suit of the plaintiff in error, which was tried by a jury, and a verdict and judgment rendered for the defendant. The plaintiff excepted to the charge given to the jury, and the facts, so far as material to be stated, may be thus condensed. The defendant and Isham Dansby agreed jointly to contribute the sum of four hundred dollars to purchase a tract of land, which was accordingly purchased by the defendant, and his individual note given for the purchase money. Afterwards the defendant called upon Dansby for his proportion, who replied that he had not the money, but that the plaintiff and himself were in partnership, and thereupon agreed to pay him \$200 in goods, the joint property of the concern. Dansby sold and delivered all the goods to the defendant, amounting to the sum of \$260. The first intimation the plaintiff had of the agreement between the defendant and Dansby was, when he presented the account for payment the defendant informed him of it ; to which the plaintiff replied that Dansby had no right to make such an agreement, and he would hold the defendant liable for the goods ; Dansby was a dormant partner of plaintiff—his name being concealed from the world because of his embarrassment, The court charged the jury that if Dansby was a dormant partner, and the defendant was informed of the existence of the partnership by him before the purchase of the goods, then the plaintiff could not recover in this action ; but the action should have been brought in the name of the plaintiff and Dansby.

R. H. SMITH, for the plaintiff in error, cited Story on Part. 351, and note ; 2 Kent's Com. 31, and note ; 1 C. & P. Rep. 89 ; 2 M. & S. Rep. 23 ; 2 Taunt. Rep. 324 ; 1 Port. Rep.

232; 9 Id. 209; 2 Ala. Rep. 502; 3 Id. 175, 733; 7 Id. 569.

W. M. MURPHY and A. R. GATES for the defendant, admitted the general rule, that a dormant partner need not be joined with an ostensible partner in a suit upon a liability to the firm, but contended that the rule did not apply, where, as in this case, the dormant partner was known to be such when the goods were purchased. They cited 4 Chit. Plead. 12; 3 Ala. Rep. 733.

COLLIER, C. J.—It is stated as a general rule that in suits at law which concern a partnership, all the parties should join, but this rule undergoes or may undergo an exception in cases of dormant partners; for it is at the option of the plaintiffs in such cases, either to join the dormant partner or omit him. [Story on Part. 350-1.] Another learned author, in his treatise on the law of Partnership, says it is not necessary that a dormant partner should join with the ostensible partners of a firm, in an action against a person who dealt only with the ostensible partners. [Collyer 393-4; see also 2 Taunt. Rep. 324; 1 Esp. Rep. 468, 1 Chit. Plead. 12; Gow on Part. 128, 3d ed.; 10 B. & Cres. Rep. 671; 2 C. & Jerv. Rep. 133; 2 H. & Gill Rep. 159; 3 Cow. Rep. 84; 4 Id. 717; 3 Greenl. Rep. 409; 8 Sergt. & R. Rep. 55; 4 Wend. Rep. 628; 19 Id. 525; 2 Verm. Rep. 65; 5 Id. 116; 7 Id. 123; 9 Id. 407.]

In Lord v. Baldwin, 6 Pick. Rep. 348, the court said that an action may be maintained by the ostensible partners without joining a dormant partner, against a person who dealt only with the ostensible partners; and it is intimated that a dormant partner is one whose connection with the firm was unknown when the transaction took place, that if he was made known as a party to it, he would not be regarded as a secret partner. [See 5 Mason's Rep. 176.] In Shropshire v. Shepperd, 3 Ala. Reg. 733, we say "that it has been repeatedly held that it is not necessary a *dormant partner* should join with an ostensible partner in an action against a person who dealt only with the latter; and it was added, that there was no evidence in the record that the defendant pur-

chased the goods (to recover the price of which this action was brought,) of the supposed dormant partner, as a tradesman carrying on a business in which he was interested, no such intendment could be made. It was held that the circuit court properly refused to charge the jury that he should have been joined as a plaintiff in the action.

The cases cited, intimate in no equivocal terms that the defendant's right of set-off cannot be materially affected, whether the suit is brought in the name of the partner only, who holds himself out to the world, or he joins with him a secret partner. [C. & P. Rep. 220 ; 4 B. & A. Rep. 437 ; 10 B. & C. 671.]

In my opinion the reason a dormant partner need not be made a party in an action for goods sold or other liability, is, because the contract is made with the ostensible party, and to him the promise inures. The ostensible partner stands in a different position from a mere agent without interest, who perhaps cannot sue upon a verbal promise—the right of action vesting in his principal as the legal beneficiary. But if the ostensible partner only, be known in the contract, he may sue alone, or the legal interest of the dormant partner will authorize a suit in their joint names. If however both the dormant and ostensible partners make themselves known, and become actors in making a contract, then they both become ostensible in respect to the party contracted with, and with no propriety of language can it be said that either of them, in such case, is a secret partner. Then the duty growing out of the contract inures to each—both are alike active, and all rights and obligations vest in, or devolve upon them united. But if this reasoning was less convincing to my mind than it is, I should long hesitate, before I would depart from even an arbitrary rule, sanctioned by the concurrence of all text-writers, and the uncontradicted *dicta*, at least, contained in many adjudged cases.

A majority of the court, however, consider the rule that a dormant partner is not compelled to join as a plaintiff, does not rest either on the fact that the person trading with the partnership has no knowledge that another is connected with the firm, or that he actually deals with the dormant partner,

knowing the existence of the firm. If the rule was subject to variation on these grounds, it would certainly vary in its application, and the propriety of the suit would depend not on the fact that there was a dormant partner, but on other circumstances which might be concealed or disclosed at pleasure. In their judgment the rule is correctly stated in the citations from 1st Espinasse's Reports. The opinion of my brethren controls, or rather overbalances mine; consequently the judgment of the county court is reversed, and the cause remanded.

JONES v. KOLISENSKI.

1. In a suit between K. and J. the record of a recovery against J. in a suit in which he was summoned by a stranger as the debtor of K. but denied his indebtedness, is no evidence of the amount then due to K. although in a contest between the creditor and J. the latter was found to be indebted to K. in a sum greatly less than claimed in the suit by K. The whole proceedings in the other suit are *res inter alias acta*,

Writ of Error to the Circuit Court of Conecuh.

ASSUMPSIT, for work and labor, &c. by Kolisenski against Jones. The defendant pleaded non-assumpsit, set off, and a former adjudication in short.

At the trial, the defendant produced the record of a suit in the county court of said county, in which he, as the garnishee of the plaintiff, at the suit of one Davidson, appealed from a judgment of a justice of the peace. He denied owing the plaintiff, and the attaching creditor took issue on his answer, when a verdict was found against him for six dollars, for which sum judgment was given for the attaching creditor. The circuit court refused to permit this record to be

read as evidence, except to show the amount recovered, and which amount was to be deducted from the plaintiff's claim in this suit, and the court instructed the jury this record was no bar to the present suit.

The defendant then offered to show the plaintiff was a party or privy to the suit in the county court, but the court rejected all evidence that the plaintiff was a privy to that suit except what was shown by the record.

The defendant excepted to these several rulings, and they are now assigned as error.

PORTER, for the plaintiff in error, cited Toulmin v. Lesesne, 2 Ala. R. 359; Mardis v. Shackelford, 1 Ib. 493; Tubb v. Madding, Minor, 129; Thompson v. Allen, 5 S. & P. 119.]

WATTS, contra, insisted, the evidence was properly rejected, because the plaintiff was no party to the suit in the county court. To give this record any effect, it should appear the plaintiff contested the defendant's answer in that cause, and also that the sum claimed by the creditor was more than the judgment allowed.

GOLDTHWAITE, J.—We think it very clear there was no error in the action of the circuit court. The record of the suit in the county court was a matter which in no way concluded either of the parties to this suit, for as to them it was *res inter alias acta*. Our statutes provide, it is true, that 'the defendant in attachment may controvert the answer of his debtor, when summoned as garnishee at the suit of another, (Dig. 60, § 24, 25;) but unless this is done, the proceedings are between the creditor and debtor only, and the judgment is operative for the latter only as laying the foundation for a set off, or payment, by showing its satisfaction. In another point of view, even if admitted as evidence, it was no bar, for the creditor may have claimed no more than the sum recovered, in which event the judgment would be as it is, although the jury trying the cause were entirely satisfied more was due. On all points the decision was strictly correct.

Judgment affirmed.

MILLER v. EATMAN, ET AL.

1. If a parent, before sending property home to his son-in-law, declares his intention that it is a loan, and not an absolute gift, and about the same time, and whilst he retains the possession of the property, makes his will, in which the same intent is declared, the will may be given in evidence to prove the intent.
2. Where one of several brothers and sisters, having title to personal property, dies in infancy, the remaining brothers cannot sue at law, to recover the property, until administration is taken out on the estate of the infant.
3. To maintain the action of detinue, the plaintiff must have the entire interest in the thing sued for, therefore three brothers and sisters cannot maintain detinue for slaves, given by the will of their grandfather to them and another, who is dead, and no administration granted on his estate.

Error to the Circuit Court of Greene.

DETINUE for four slaves, by the defendant in error, against the plaintiff in error.

Upon the trial of the cause, the plaintiff introduced an authenticated copy of the will of Stephen Bobbit, made in North Carolina, and dated 4th April, 1823, containing a clause, which was read to the jury, "I give and bequeath to my daughter Seley Montford, one negro girl named Linsey, and a boy named Jim, a feather bed and furniture, and cow and calf, during her life, and at her decease to be equally divided between her children, to her and her heirs forever;" and proved, that at the time the will was made, Seley Montford was the wife of Thomas J. C. Montford; that she died about fifteen or sixteen years before the trial of the cause; that she left four children, three of whom are the plaintiffs; that the fourth was a son, who died a minor six or seven years old, and there was no evidence that administration had ever been granted on his estate. It was further proved, that Stephen Bobbitt died in July, 1824, and that the slaves sued for are the children of Linsey.

The defendant introduced testimony conducing to prove, that Seley Bobbitt was married to Thomas J. C. Montford, in September, 1822, and that before the making of the will of Stephen Bobbitt, the new married couple had gone to house-keeping, about four miles from the residence of Stephen Bobbitt; and that from the time they so went to house-keeping, until the sale by T. J. C. Montford in 1828, to Moses Lewis, under whom the defendant claimed, the slave Linsey had always been in the possession of T. J. C. Montford.

The plaintiffs, by way of rebuttal, offered the deposition of one Harris Bobbitt, taken upon interrogatories, one of which was, Did you some short time before Stephen Bobbitt made his last will and testament, hear him say any thing in relation to certain property, which he designed to give his daughter Seley Montford? If yea, state what that conversation was. The defendant objected before the commission issued, to the competency of this interrogatory, and to the competency of any answer which might be given. The deponent answered, "I did. Some short time before Stephen Bobbitt made his last will, he came to my house, bringing with him, or speaking of a rough will, or memorandum, as how best to dispose of a part of his property, to his youngest daughter Seley, who had married with Thomas J. C. Montford, and he having no confidence in Montford, stated to me, how he should dispose of his property to his daughter, so that Montford should not make way with it, or spend it in any way. He finally concluded, he would not leave it in the power of any of his daughters' husbands, to spend any of his property, though he said he doubted none of them but Montford. The court overruled the objections to the interrogatory and answer, and permitted the answer to be read. There was also testimony offered by the plaintiffs, conflicting with that offered by the defendant, as to when the slave Linsey went into the possession of Montford, but none of the testimony showed, that it was later than a month after he went to house-keeping. That after the death of Bobbitt, he moved to Alabama and sold the slave to Lewis. There was no evidence that either Montford or his wife had any knowledge of

the conversation of Stephen Bobbitt with Harris Bobbitt, or of the making of the last will of the former.

The defendant insisted before the court, that the plaintiffs could not maintain this action, unless they had the entire interest, and that the interest of the brother who died in infancy, could only descend through his legal representatives, but the court refused so to charge the jury, but instructed them that the action was well brought.

The court further charged, that if, when a new married couple went to house-keeping, the father of the lady sent property home with them, the law would presume it to be a gift, unless there was a declaration, or act of the father, at, or about the time, showing it to be a loan, or otherwise limited estate. That to prevent such an act from so operating, there ought to be an open declaration, made by the father, at, or about the time, of the manner in which the property went into the possession of the son-in-law, but that the will of Stephen Bobbitt would be such a declaration, as would indicate his intention to confer such a limited estate, he being still in possession.

The defendant moved the court to charge, that the clause of the will in evidence was not such a declaration as would prevent the presumption of an absolute gift, in favor of the husband; which the court refused, and charged the jury, that if they believed from the evidence, that at the time of making the will, the father retained the possession of the slave in question, then the making of the will, in connection with the other evidence in the cause, tending to explain his intention, would be sufficient to repel the presumption of an absolute gift to the husband; to all which the defendant excepted, and which he now assigns as error.

J. B. CLARKE, for plaintiff in error.

1. An action of detinue cannot be maintained, unless the plaintiffs have the entire interest in the chattel sued for. [Bell and wife v. Hogan, 1 Stewt. Rep. 536; Hart v. Fitzgerald, 2 Mass. R. 509.]

2. The interest of one, of several joint owners of a chattel, is several; and does not at his death vest in the other part owners, even should they be his next of kin; but vests

in his personal representative. [Maury's Adm'r v. Mason's Adm'r, 8 Port. R. 211; Boyatt, &c. v. Kerr, 7 Ala. R. 9.]

3. A father, who sends property to a newly married daughter, cannot prevent the property from vesting absolutely as a gift, by making a declaration that he intended only a life estate; a knowledge of which declaration was never communicated either to the daughter or the son-in-law. [Hogan v. Bell and wife, 4 Stewt. & P. 286.]

4. But should a declaration made by the father, that he intended to vest only a life estate in property sent home to a newly married daughter in her, be obligatory on the daughter and her husband, so as to limit their rights; in a contest between the issue in remainder and a purchaser from the husband, such declaration would not be sufficient to defeat the purchaser from the husband. [Hill, et al. v. Duke, 6 Ala. Rep. 259; Collier and wife v. Poe, 1 Dev. Equity Rep. 55.] •

5. If either of the two last points can be sustained, it follows that the objection to Harris Bobbitt's testimony ought to have been sustained.

WOMACK, contra.

1. That the minor who died at the age of six or seven years, should not have been represented in this suit. [See 3 Bacon's Abridg. 675; 2 Lomax on Ex'rs and Adm'rs, 514, 521; also 1 Williams on Ex'rs, 546-7; 2 Id. 1145; 2 Steph. Com. 77; 1 Chit. Pl. 12, 58; Watson's Partnership, (marg. page,) 364; Myers v. Wade, 6 Rand. 448; Murray v. Mumford, 6 Cowen, 441; see also Bethea v. McColl, et al. 5 Ala. 315.]

2. The declarations of the father and testator, made at or about the time of parting from the slave in question, and his making the will at or about the time of parting from said slave, were properly admitted, to show his intention. [See Olds v. Powell, 7 Ala. 652; Banks v. Hatton, 1 Nott & McCord, 221; Collier and wife v. Poe, Dev. Eq. 55.]

3. The charge of the presiding judge in the court below, was proper. [See Paul v. Meek, 6 Ala. 753; Thorndike v. City of Boston, 1 Metcalf, 242.]

ORMOND, J.—We think the principle stated in *Olds v. Powell*, 7 Ala. 655, governs this case. A will not published, or made known to others, would not be evidence of an intention, not to give the entire estate, because to countervail the presumption which the law makes of a gift, where property is sent home to the new married couple, the declaration of a contrary intent should be open and clear, and not left to be inferred from doubtful or ambiguous circumstances, which the donor might avail himself of, or suppress at his pleasure. But we cannot perceive how the fact, that it was written down, as well as declared verbally, can alter the case. The slaves being then in the possession of the donor, the fact of making the will, pursuant to the declared intent before the property was sent, is strong evidence of a fixed and settled purpose, not to give the son-in-law the entire estate.

The objection is urged, that a parent cannot by a parol declaration, create a remainder over, after the termination of the life estate. We do not understand that to be contended for here, but that the will, considered as a declaration, was evidence, in connection with the verbal declarations made previous to the property being sent home, that the father did not intend to make a gift to the son-in-law. It was then necessarily a mere loan of the property, the title remaining in the father, and at his death it passed according to the provisions of his will. [*Banks v. Hatton*, 1 Nott & McCord, 221; *Collier v. Poe*, 1 Dev. Eq. 55.]

The case of *Hill and Hill v. Duke*, 6 Ala. 259, depends upon different principles. Undoubtedly, in a case where the transaction was recent, or comparatively so, the question would be the same, whether it arose between the donor and donee, or between the former and a creditor, or purchaser from the latter; but after a long continued possession by the donee, in a controversy between his creditors and the donor, a subsequent gift might be inferred, especially in cases not affected by the statute of frauds. Thus, in the case last referred to, this court says, "when such a loan is extended over a period of ten years, and no period is fixed for its determination, it is not too much to say, in a contest between a creditor and the donor, that a strong presumption to infer a subsequent absolute gift, is well warranted, even if the bail-

ment was originally designated as a loan between the parties themselves." Here no such presumption can arise, as the father died a short time after the property was sent home to the donee, leaving a will, by which he assumed the right to control it.

The remaining question is, whether this action can be maintained by the surviving brothers and sisters, without any administration upon the estate of the brother, who died in infancy. At common law, personal property did not descend to the heir, but was vested in the ordinary, and it was not until the 31st Edward 3, that the ordinary was required to grant administration to the friends of the deceased. Our statute law has also directed, who shall be entitled to administration, and how the surplus after the payment of debts, shall be distributed. From this it follows, that the legal title to the personal property of one dying intestate, can only be derived through an administrator. Although therefore, an infant of six years of age has no capacity either to make a will or to contract debts, yet as his personal estate does not descend to his heirs at law, no action can be maintained by them at law for its recovery, unless they can deduce their title through an administrator, in virtue of the statute of distributions. This was held by this court in *Hogan v. Bell and wife*, 1 Stewart, 536, and *Boyett v. Kerr*, 7 Ala. 9.

In courts of equity, where it is not necessary that the legal title should be vested in the plaintiff, an administration may be dispensed with, where the right is asserted by those who would be entitled to distribution, and where it is clear there are no creditors to be prejudiced. Such was the case of *Bethea v. McColl*, 5 Ala. 315.

But even these are exceptions to the general rule, which is the same in equity as at law.

To recover in the action of detinue, the plaintiff must have the entire interest in the thing sued for; either the absolute property with the right to the immediate possession, or a special property as in the case of a bailee. As therefore it appears, that one-fourth part of these slaves vested in the deceased infant, upon the death of his mother, his remaining brothers and sisters, though his distributees, can derive their title to it only through his legal representative; and as their

inability to do so is admitted on the record, they cannot maintain this action. This objection is purely technical, but so long as the distinction between the succession to real and personal property is permitted to stand upon its present footing, it must be recognized by the courts, although in this particular case, no possible injury could result from permitting the action to be maintained by the present plaintiffs. Whether it would be necessary for the administrator to unite with the others in the prosecution, is a question it would not be proper now to decide.

The authorities referred to on the subject of joint tenancy, have no application here. Let the judgment be reversed.

GOLDTHWAITE, J.—I concur in the result of reversing the judgment, but I think it should be reversed on both grounds. I fully concurred in what was said in *Powell v. Olds*, but I think the facts given in evidence here go greatly beyond that case. Undoubtedly declarations made by a parent about the subject matter of a gift to a daughter or any other child, are proper as part of the *res gesta*. But it is only on the ground that the gift is then the matter transacting. The making of a will is a different transaction altogether, and the *res gesta* attendant on that cannot in my judgment be connected with another and different transaction, to wit, the act of sending the slave home with the daughter. Each transaction is a different one, and, though either may be explained by declarations made at the time, the declarations attendant on the one, in my judgment, are not admissible to explain the other.

NEIL v. JOHNSON.

1. The duty of maintaining the wife devolves on her husband, though she have a *dower estate* in virtue of a previous marriage. During the *joint lives* of

husband and wife, the husband has the sole control and management of such an estate; and consequently an interest for that period, which may be levied on and sold under a *fiery facias* to satisfy a judgment against him.

Writ of Error to the Circuit Court of Dallas.

THIS was an action of trespass at the suit of the plaintiff in error, brought to try titles to, and recover the possession of a tract of land particularly described in the indorsement on the writ, and in the declaration, &c. The cause was tried by a jury, who returned a verdict for the plaintiff, and judgment was thereon rendered. Upon a bill of exceptions sealed at the instance of the defendant, the question is raised, whether the dower of the widow in the lands of her first husband, are liable upon a subsequent marriage to levy and sale under execution for the debts of her second husband—the dower being assigned to her, and herself and husband living together.

E. W. PECK, for plaintiff in error. Can the lands which have been allotted to a widow as her dower under our statute be levied upon and sold for the debts of an after husband? If so, then I admit there is no error in the record, but I insist that lands in such case cannot be sold, for an after husband's debt.

The statute declares, that the widow's dower "shall be and inure to her proper use, benefit and behoof, in and during her natural life." Will not the manifest object of the statute be defeated by permitting her dower to be seized and sold for debts of an after husband. [Clay's Dig. 172, § 3.]

G. R. EVANS, for the defendant in error, cited 2 Kent's Com. 134, 342; 2 Dev. & Bat. Rep. 133; 1 P. Wms. Rep. 258; 3 Thomas' Coke, 306, 309, 357; Roper on Hus. & W. 186, 187; 4 Porter's Rep. 233; 3 Ala. Rep. 509.

COLLIER, C. J.—Dower by the common law is defined to be an estate for life in the third part of the lands of which the husband was seized, either in deed or in law, at any time

during the coverture, of a legal estate of inheritance in possession, which the issue of the wife might by possibility inherit, and which the law gives to every married woman, who survives her husband, to be enjoyed by her in severalty from the death of her husband; whether she have issue by him or not. The object of this estate is the sustenance of the widow and the nurture and education of her children, if any—and the right to it attaches immediately upon the marriage or as soon after as the husband becomes seized; and cannot be discharged by the husband without her concurrence. [Park on Dower, 5.] In point of tenure a dowress holds of the heir, yet in point of title, she is *in* of the lands assigned to her by her husband, and not by the person making the assignment; for as soon as the dower is assigned the law supposes her in by relation from the death of her husband. [Id. 340.] The statute of this state provides that the dower which shall be assigned to the widow, in the lands of her deceased husband, shall “inure to her proper use, benefit and behoof, in and during her natural life.” [Clay’s Dig. 172, § 3.] This enactment does not, in our judgment in any manner change the tenure by which the wife held her *dower estate*, at the common law. The words which have been quoted mean nothing more than, that its enjoyment should not be disturbed by any act done by the husband in his lifetime, or by his heirs since his decease; and that it should not be liable to his debts. From this view it results, that the interest of the wife is a freehold for her own life.

It is said that all freeholds of which the wife is seized at the time of the marriage, or afterwards, are by law vested in the husband and wife during the coverture, in right of the wife. During their joint lives, the husband is entitled to the profits, and has the sole control and management; but cannot convey or charge the lands for any longer period than while his own interest continues. If the estate of the wife be one of inheritance, and there be an actual seizen, and a child of the marriage born alive, capable of inheriting the property, the husband upon the wife’s decease, becomes *tenant by the curtesy*, for his life. [2 Steph. Com. 299.] This being the law, it would seem to follow that the second husband succeeds to a *dower estate*, which has been assigned to his

wife as a consequence of her former marriage, in all respects as he does to her other freehold interests. And if he can convey or charge, her freehold in lands, we can perceive no reason why it may not, for the period of *their joint lives* be sold under execution to pay his debts. The duty of maintaining the wife devolves upon the husband, though she may have a *dower estate*, and he must therefore be allowed to control this estate, and receive the profits while that duty continues. There is no error in the ruling of the circuit court, and the judgment is therefore affirmed.

SMITH & BOWDON v. KNIGHT.

1. When the judgment is in the name of K. as guardian of C. and after a levy and forthcoming bond, on a *fi. fa.* pursuing the judgment another *fi. fa.* is issued on the bond, in the name of C. by his guardian K. the last execution is irregular, because of the change of plaintiffs, and should be quashed on motion.

Writ of Error to the Orphans' Court of Henry.

At the return of a *supersedeas* sued out by Bowdon and Smith to stay proceedings on a certain execution against them and one Stephen Cawthorn, they moved the court to quash the forthcoming bond and previous writs of *fi. fa.* on which the execution superseded was founded. The matter is greatly involved by the nature of the previous proceedings, but may be thus stated :

On the 23d of June, 1845, a judgment was rendered by the orphans' court of said county in favor of Knight as the guardian of Josiah A. Cawthorn, against Speight his former guardian for \$1,453. On this judgment a *fi. fa.* was issued, and returned no property, previous to the 16th October, 1845. William Cawthorn, Stephen Cawthorn, Geo. Jones,

and William Armstrong were the sureties of Speight, on the guardianship bond, executed by him on assuming that trust. George Jones died after the execution of the bond, and John Jones was appointed his executor, or administrator.

On the 16th October, 1845, Knight sued out a *fi. fa.* against Speight, and against Wm. Cawthorn, Stephen Cawthorn, Wm. Armstrong, and John Jones, executor of Geo. Jones, who are described as sureties for Speight, guardian as afore-said. In this *fi. fa.* is recited the fact that the former *fi. fa.* had been issued against Speight and returned, no property. This was returned levied on four slaves in the possession of Stephen Cawthorn, one slave in the possession of the widow of George Jones, on two others in the possession of John Jones. This *fi. fa.* was superseded at the instance of John Jones, on the 4th November, 1845, and the *supersedeas* continued until the 5th of December of the same year.

Stephen Cawthorn gave a forthcoming bond with Lewis Bowdon and S. A. Smith as his sureties for the delivery of the slaves levied on in his possession. This bond is dated 31st October, 1845, and recites the execution under which the levy was made, except that the name of the plaintiff is omitted, and its condition is, that the slaves shall be delivered to the proper officer, on the 1st Monday of December then next, by 12 o'clock. It was returned indorsed forfeited, by the non-delivery of the slaves, on the 2d December, 1845.

On the 27th April, 1846, a *fi. fa.* was issued, which recites the previous *fi. fa.* issued on the 17th October previously—the giving of the forthcoming bond by Cawthorn, Bowdon and Smith—the return of the same as forfeited—that another execution had previously issued on this bond and was superseded by writ of error, which it was certified to the clerk had not been prosecuted to the court to which it was sued out. It then proceeds to command the making of the sum of \$1453, from the goods, &c. of Cawthorn, Bowdon and Smith which *James A. Cawthorn* by his guardian, Rich'd Knight, on the 23d June, 1845, had recovered of them in the orphans' court of Henry county.

There were no other judgments or proceedings other than those recited to justify the several writs of *fi. fa.* and Smith and Bowdon offered to show by parol, that there was no con-

sideration for the forthcoming bond—that the property levied on did not belong to Cawthorn, or to any of the defendants in execution. This proof was ruled out, and the court refused to quash the bond on the execution on the 27th April, 1846. The parties prayed an appeal to this court, and open by their assignment of error all the questions raised on their motions in the court below.

BELSER and BUFORD, for the plaintiff in error.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—There is one error in this case, which is entirely apparent, and as the entire litigation between these parties will probably be ended by the reversal of the main judgment in the case of Speight v. Knight, at this term, we shall only examine that for the purpose of disposing of this record. It will be seen the *fi. fa.* of the 27th April, 1846, is in the name of Cawthorn by his guardian, Knight, while the previous proceedings, as well as the main judgment, are in the name of Knight, as the guardian of Cawthorn. The execution in that form has nothing to support it, and for this reason should have been quashed. Let the judgment be reversed, and the cause remanded.

MOYLER v. MOYLER.

1. To constitute legal cruelty, to authorize a divorce, there must be actual violence committed, attended with danger to life, limb or health; or there must be a reasonable apprehension of such violence.
2. The throwing a bucket of water on the wife in bed, with a threat of further violence if she did not leave the house, is legal cruelty.
3. Abusive language, and other unbecoming conduct, not amounting to legal cruelty, may be received in aggravation of an act of cruelty.

4. The answer of a defendant denying the allegations of the bill, does not make it necessary to prove them by two witnesses. Proof by one is sufficient.

Error to the Chancery Court sitting at Limestone.

THE bill was filed by the plaintiff in error, for a divorce *a vinculo*, upon the ground of cruel, barbarous, and inhuman treatment on the part of the husband; this the bill charges in general terms to have commenced soon after the marriage, and to have been continued until the separation. The bill also specifies the following instance of cruelty: that on one occasion, at night, after they had retired to bed, he pulled her out of bed, in a rude and angry manner, and at the same time threw a bucket of water over her, threatening to take her heart's blood, if she did not leave his house before morning; at the same time cursing, and abusing her in the most cruel and in inhuman manner. At another time he shook his fist in her face, and threatened to cut her throat, heaping upon her at the time, the coarsest and most abusive epithets, without any provocation on her part. These are stated in the bill, as instances merely of his general conduct. "It contains also the necessary allegations to give the court jurisdiction, and prays a divorce from the bonds of matrimony.

The defendant in his answer, denies the allegations of the bill, and insists that the true cause of her leaving him, was that he was unable to support her in the rank and style in which she desired to live. The answer is not sworn to.

Much testimony was taken, which is sufficiently stated in the opinion of the court.

The chancellor upon an examination of the testimony, considered that the charge of cruelty was not established by two witnesses, or by one with corroborating circumstances, so as to countervail the denial of the defendant in his answer, and dismissed the bill.

E. J. JONES, for plaintiff in error.

This is a bill for divorce, on the statutory grounds of cruel,

barbarous and inhuman treatment. The charges are both general and special.

Defendant answers, denying the general and specific charges. The answer is signed by his solicitor, but not by himself, or sworn to.

The main question in the case is as to the conclusion the chancellor attained on the examination of the evidence. We think the evidence required a decree for complainant.

In the prosecution of this inquiry, we may find it important to make the following points :

1. The answer, not being sworn to, should not be treated as an answer.

2. The rule of law, requiring two witnesses, or one witness and strong corroborating circumstances to overbalance the denial of an answer, does not apply to cases of divorce.

3. Or, at any rate, does not apply when the answer is not sworn to. [Lovell v. Steam Saw-mill Company, 6 Paige, 59.]

4. Mere words, unaccompanied with personal violence, may amount to this statutory ground of divorce.

L. P. WALKER, contra.

ORMOND, J.—The statute of this State, enumerates specifically the causes for which divorces may be granted, and amongst others, where the husband's treatment of his wife is "cruel, barbarous and inhuman." This bill is filed for a divorce for this cause. It has not hitherto been determined by this court, what acts or conduct on the part of the husband, will entitle the wife to a divorce for this cause, and as it is directly presented upon the record, and necessary to be decided, we will first proceed to the consideration of that question.

It is the policy of that country from which we derive our laws, as well as our social and domestic habits, not to grant divorces for trivial causes, and that such is the policy of this State, is manifest from the act, a part of which has been cited; in which the legislature, have accumulated expressions, of nearly equivalent import, as if for the purpose of hedging it round with difficulties. Nor can it be doubted that this

policy, harsh though it may seem upon a hasty glance, is conceived in the most profound wisdom.

Marriage is the most important of all the social relations. Upon the strict observance of its duties, by the married pair, depends not only every thing which ministers to comfort and happiness, but also to private virtue. A facility of obtaining divorces, not only tends to generate discord in families, by removing the restraints which necessity imposes, of a conformity to the habits, opinions, and even to the caprices of each other, from the conviction that the tie is indissoluble, but it also leads to licentiousness, and the disregard of the offspring of the marriage, and thus saps the very foundation of domestic happiness, and public virtue. Historians trace the decline of public morals, in ancient Rome, to this cause, more than to any other; and it cannot be doubted that the State in its political capacity, has a deep interest in this question.

The ecclesiastical courts of England, to whom this important duty is entrusted, are the repositories of the learning upon this subject, and under the guidance of a series of eminent men, it has been perfected into a system. The case of *Evans v. Evans*, 2 Haggard, 35, is the leading case upon the subject of "cruelty." Sir William Scott in his judgment, says, that to constitute legal cruelty, there must be reasonable ground to apprehend danger, to life, limb, or health. He proceeds to say: "This however must be understood, that it is the duty of courts, and consequently the inclination of courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as show an absolute impossibility, that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place, before the duties of marriage, which are secondary, both in commencement, and obligation.

What merely wounds the mental feelings, is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to

legal cruelty ; they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not the cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side, as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection ; must subdue by decent resistance, or by prudent conciliation, and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the courts much injustice may be suffered, and much misery produced, the answer is, that courts of justice do not pretend to furnish cures for all the miseries of life. They redress, or punish gross violations of duty, but they go no further ; they cannot make men virtuous, and as the happiness of the world depends upon its virtue, there may be much unhappiness in it, which human laws cannot undertake to remove.

Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings, arising from the particular rank and situation ; for the court has no scale of sensibilities, by which it can gauge the quantum of injury done and felt ; and therefore, though the court will not absolutely exclude considerations of that sort, where they are stated merely as matters of aggravation, yet they cannot constitute cruelty, where it would not otherwise have existed ; of course the denial of little indulgencies, and particular accommodations, which the delicacy of the world is apt to number among its necessaries is not cruelty. It may to be sure be a harsh thing to refuse the use of a carriage, or the use of a servant : it may in many cases be extremely unhandsome, extremely disgraceful in the character of the husband ; but the ecclesiastical court does not look to such matters ; the great ends of marriage may be very well carried on without them ; and if people will quarrel about such matters, and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason, yet they must decide such matters as well as they can, in their own domestic *forum*.

These are the negative descriptions of cruelty, they show only what is not cruelty, and are yet perhaps the safest definitions which can be given, under the infinite variety of possi-

ble cases that may come before the court. But if it were at all necessary to lay down an affirmative rule, I take it, that the rule cited by Dr. Beaver, from Clarke, and the other books of practice, is a good general outline of the canon law, the law of this country upon this subject. In the older cases of this sort which I have had the opportunity of looking into, I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court, in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited, in which the court has granted a divorce without proof given of a *reasonable apprehension* of bodily hurt. I say an *apprehension*, because assuredly, the court is not to wait till the hurt is actually done; but the *apprehension* must be *reasonable*; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind, may certainly in time wear out the animal machine, but still they are not cases of legal relief: people must relieve themselves as well as they can by prudent resistance—by calling in the succors of religion, and the consolation of friends; but the aid of courts is not to be resorted to with any effect."

We have been induced to make this long extract, not only from its exquisite beauty and justness of thought, and language, beyond any thing we could furnish, but because it places in the clearest, and strongest point of view, the law, and the reason upon which it is founded, and has, ever since it was pronounced, been considered as settling the rule in England, as to what constitutes legal cruelty, in cases of this kind. Thus it is said, in *Lockwood v. Lockwood*, 2 Curteis, 281, "There must be either actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension, of such violence. This I apprehend to be the substance of the doctrine laid down in *Evans v. Evans*, 1 Hagg, C. R. 35, cited in the argument in this case, and other subsequent cases."

With this exposition of the law applicable to cases like the present, we proceed to the consideration of the allegations,

and proof in this cause. The bill charges, that within two weeks after the marriage, the defendant began a course of cruel, and inhuman conduct towards her, which he continued until the separation, and that she was forced to abandon him, from fear of personal violence. One act of violence, which is specified, alledges, that after they had retired to bed, he pulled her out in a rude and angry manner, throwing a bucket of water over her, and cursing and abusing her in the coarsest manner, and threatening to take her heart's blood, if she did not leave his house before morning. This is fully proved by the witness, Campbell, who boarded in the house, and he states the additional aggravating circumstance, that the defendant, after throwing a bucket of water over his wife in bed, would have put her out of doors in the night, if the witness had not prevented it. This atrocious act, is fully within the strictest definition of legal cruelty. The same witness proves, that he saw him on one occasion, throw a glass of milk in her face at table, and another, Nancy Critz, saw him shake his fist in her face. Many witnesses prove that he was in the habit of using the most opprobrious and insulting language towards her, and of cursing, and abusing her in the most blasphemous manner. These matters, though not of themselves sufficient to constitute cruelty, are very proper to be received in aggravation of an act of cruelty. An act even strictly of legal cruelty, might be committed under the influence of passion, for which the offender might be sorry immediately after, and be willing to make any reparation in his power. But when cruelty is found in connection with a uniform course of brutal, unkind treatment, accompanied with the most abusive and insulting language, a case is fully made out, justifying the interposition of the court.

The proof shows that the wife was kind, dutiful and obedient; nor does the proof adduced by the husband impair the force of the proof made by the wife. It is negative in its character, and although in cases of this kind, this may be the only proof in the power of the party, to outweigh the positive proof on the other side, it must appear that from the opportunity of the witness, and his means of knowledge, the fact could not well have happened without his knowing it. The testimony of Harraway, and Arnett, cannot outweigh, or

even cast suspicion on the testimony of Campbell, as they were boarders merely, and did not lodge in the house, consequently were there only at their meals. But Campbell being a lodger, as well as a boarder in the family, had ample opportunities of knowing the manner in which the defendant treated his wife.

The declarations of the wife, as to the cause of her leaving her husband, are certainly entitled to some consideration. Indeed her declaration in relation to an act of violence, made shortly after it happened, would probably be evidence for her, and of necessity it must be evidence against her. But we think great allowance must be made in such cases, as it is not to be wondered at, that a wife about to separate from her husband, should desire to keep from the gaze of the world such mortifying disclosures, although after the lapse of years she might be anxious to vindicate herself, by making the same facts public. It appears that she told one of the witnesses, to whom she communicated the fact, that she was about to leave her husband, that she would rather die than leave him, but that she was compelled to do so; and to another, that she was about to separate from him, because she was unwilling to raise a large family in indigence. The first seems to be creditable alike to her head and heart, and the last may be strictly true, without any impeachment of the integrity of this application. A woman who might be willing to struggle with poverty, when cheered on in the performance of her duties by kindness, and affection, might be wholly unable to the performance of the task, when accompanied by cruelty and unkindness.

We understand the chancellor as holding, that the charge of cruelty was made out by the proof, if the testimony of one witness was sufficient to establish it, but he considered that the denial of the facts alledged, by the defendant in his answer, must, as in other chancery cases, be countervailed by the testimony of two witnesses, or of one with corroborating circumstances.

In ordinary chancery suits, the rule here spoken of, does not apply where the defendant, although he deny the allegation, is not personally cognizant of it; nor does it apply when the answer is not sworn to. But in these cases, it is

evident the legislature did not intend the answer should be evidence, either for the husband or wife, as the defendant is not required to swear to the answer, and proof is required of the allegations of the bill. [Clay's Dig. 170, § 6.] A subsequent section declares, that the confession of neither shall be taken or received in evidence. [Ib. 171, § 16.] It is evident therefore, that these cases do not stand upon the same footing with ordinary chancery causes, as it respects this question, and the reason failing, the rule must fall with it.

Perhaps the answer may be necessary as pleading, where the defendant relies on a condonation of the offence, or sets up the misconduct of the other party, or any other substantive matter, in opposition to the divorce sought. Be this as it may, it is clear the answer was not intended to be evidence for any purpose, and it follows, that as an admission of the facts alledged in the bill, would not dispense with proof of them, a denial can have no other effect, than a mere traverse. The principal allegation of cruelty is fully made out by the testimony of one witness, and corroborated by proof of other acts of harsh, and unkind treatment, commencing soon after the marriage, and continuing during the entire cohabitation. If it were necessary, it might also be worthy of consideration, whether the long separation of these parties; extinguishing the last spark of affection, and rendering the prospect of a re-union gloomy and comfortless, should not also be considered in the formation of a judgment; but we abstain from entering on that inquiry, because in our opinion, the case is fully made out under the statute, independent of it, and that the complainant is entitled to the decree she seeks. The decree of the chancellor must be reversed, and this court proceeding to render such decree, as should have been rendered, hereby order, adjudge and decree, that the complainant be divorced from the bonds of matrimony heretofore existing between her, and James W. P. Moyler, her husband.

DOSWELL, ET AL. V. STEWART.

1. In a proceeding under the act of 1843, "to establish lost records in Henry county," there appeared on the notice to the defendants, an acknowledgment of its service on one of them, with the words "and proved" written in the same sentence and immediately following; but this indorsement was dated previous to the notice being placed in the sheriff's hands, and the sheriff did not affirm by his return its execution on this defendant. The judgment entry however recited *that the parties in interest had notice of the proceeding*: Held, that in this condition of the record, it must be intended on error, that the parties to the judgment were before the primary court for its action.
2. The power of supplying a new record where the original has been lost is one which pertains to courts of general jurisdiction, independent of legislation, and if the notice of the motion for leave to substitute it, is explicit in describing a judgment and papers alledged to be lost, it is sufficient, though it does not conform to a statute which provides for such a proceeding.
3. Where the judgment and papers of the cause which were lost, are supplied by others, the order permitting it will not be reversed on error at the defendant's instance, though the substituted judgment is for less than the cause of action indicated by the declaration, and the primary court having ascertained that payments had been made on the original judgment, directed an execution to issue for only so much as was unpaid, it cannot be affirmed that there is an error; or if there is, it is beneficial to the party complaining.

Writ of Error to the Circuit Court of Henry.

THIS was an action of assumpsit on a promissory note at the suit of the defendant in error against the plaintiffs. It appears from the record that a judgment was recovered against the defendants below; and that subsequently all the papers and proceedings in the cause were destroyed by fire. The writ, declaration and judgment have been substituted, professedly under the authority of a special act of the legislature, and the questions now presented arise out of the proceedings under that statute.

J. F. BELSER, for the plaintiff in error. The act of 1843,

to establish lost records in Henry county, must be construed with the utmost strictness, every direction it prescribes must be pursued; and if after investigation and proof the matter is uncertain, the loss cannot be supplied. [8 Ala. Rep. 300.]

The judgment substituted, is for an amount different from that originally rendered, and is unsupported by the writ and declaration. It was not proved which of the defendants was a non-resident, though the order of publication found in the transcript, affirms such to be the fact—nor was the service of notice on Freeman established by proof.

No counsel appeared for the defendant in error.

COLLIER, C. J.—It is objected by the appellants that one of the defendants below, Caven Freeman, was not served with notice as the statute of 1843 “to establish lost records in Henry county” directs, and that the substituted judgment is for an amount different from that originally rendered.

There is indorsed on the notice an acknowledgment of service by the defendant referred to, dated previous to the time when it was delivered to the sheriff, and the return does not affirm that it was executed on the defendants generally. It was then necessary that its execution should have been proved.

The judgment entry recites that the commissioners reported the substituted papers, &c. which “were read and heard by the court, and there being no exceptions or objections taken thereto, the said parties in interest having notice thereof. It is considered,” &c. Whether we consider the proceeding in reference to the statute or the common-law, a notice is indispensable to its regularity, and this should be shown either by the return of an officer upon a formal notice, or by an affirmation of the fact upon the record.

We have repeatedly held that a recital in the judgment that the parties came by their attorneys, was sufficient to authorize an appellate court to infer that the defendant appeared, although the process was returned “not found.” Is not an affirmation in the final action of the court in a case like the present entitled to equal credence, and shall we not ac-

cord to it verity; especially when immediately following the acknowledgment of service to which the name of Freeman is subscribed, we find the words "and proved." If neither of these when taken singly are sufficient to prove notice, when taken together we think they cannot be disregarded.

The notice in the transcript does not conform to the second section of the act referred to, yet it is explicit in describing the judgment and papers which are alledged to be lost, and required the defendants to appear at court on a day designated, and show cause why they should not be substituted. This was quite sufficient according to the requirements of the common law. And it was held by this court in *McLendon v. Jones*, 8 Ala. Rep. 300, that the power of supplying a new record where the original has been lost, is one which pertained to the circuit courts independent of an express authority from the legislature; and might be exercised in virtue of the full and plenary powers with which they are invested to "minister ample justice to all persons according to law."

It is objected that the judgment does not conform to the substituted declaration. True, the judgment is for a less sum than the note declared on, yet it may well be intended that the note had been reduced by payments, or that the judgment was for as much as the plaintiff claimed. But however this may be, if there is an error, it is beneficial to the plaintiff, and he cannot complain.

Again: after establishing the lost papers and the judgment, the court ascertains that the greater part of the judgment had been satisfied, and orders that the plaintiff shall have execution for the unpaid balance. If in this there is error, it is for the advantage of the defendants, and furnishes no ground for the reversal of the judgment at their instance. This view is decisive of the case, and the consequence is, the judgment is affirmed.

OLIVER v. ELLZY.

1. When money is received by one from a sheriff to which another is entitled, but the person receiving it gives a bond of indemnity to the sheriff, reciting the attachment of the money at the suit of a stranger, against the person entitled, and providing for the repayment unless the money is determined to belong to the person receiving it, these recitals are not evidence of the existence of the attachment in a suit by the person entitled against the one receiving it. If however, the existence of the attachment in 1840, was shown, the presumption, from the lapse of time, is, that it was discharged so as to determine the lien.

Error to the Circuit Court of Montgomery.

ASSUMPSIT by Ellzy, against Oliver, to recover a sum of money due by promissory note. The defence is payment and set off.

At the trial, the defendant offered evidence conducing to prove, that he had purchased from the plaintiff a certain claim held by him against one Williams. It appears that this claim was reduced to judgment, in South Carolina, in the name of Ellzy, and that the money was paid by Williams to the sheriff. Ellzy claimed the sum collected from the sheriff, and threatened to rule him as he declined paying it over on the ground that Oliver also claimed it. After some conversation between the sheriff and Ellzy, the latter said he claimed only one half of the sum collected, and some \$355, was paid him upon his executing a bond of indemnity, with sureties, to the sheriff, conditioned to be void if that sum claimed in the sheriff's hands by an attachment, at the suit of Mayhew and another against W. B. Oliver, should be determined to belong to Ellzy. The bond is dated 6th November, 1840, and there was no other evidence in the cause than before stated, except the statement of a witness, that after the death of the sheriff, in 1841, Ellzy claimed the balance of the money collected from Williams, which balance, with other cases, was

tied up in the court of equity, at the time the witness answered, under a bill for the final settlement of the deceased sheriff's office. On this state of proof, the court charged the jury, that if the money sought to be set off was attached in chancery in South Carolina, and Ellzy received it from the sheriff as above stated, then the money was to be considered as in custody of the law, and could not be set off in this action, unless it was shown the chancery suit was disposed of, and the money relieved from the operation of the attachment.

The defendant excepted to this charge, and it is now assigned as error.

J. D. F. WILLIAMS and A. MARTIN, for the plaintiff in error, insisted that as money cannot be attached in the hands of the sheriff the attachment was inoperative, but independent of this, the presumption, from the lapse of time, is, that the suit was ended. [Hobson v. Kissam, 8 Ala. Rep. 363.] The *onus* of showing the attachment is with the plaintiff, who asserts its existence. [Henman v. Pope, 1 Gilman, 131; 1 Greenl. Ev. 85.]

MAYS and ELMORE, contra, cited Crawford v. Simonton, 7 Porter, 110; Lock v. Miller, 3 S. & P. 13; 8 Cowan, 304; 4 Wend. 604, and insisted it rested with the defendant to show the determination of the attachment suit.

GOLDHWAITE, J.—There is no difficulty in this cause when the facts are ascertained. If the money collected by the sheriff in South Carolina belongs of right to Oliver, its receipt by Ellzy, under ordinary circumstances, would make him accountable to the true owner; but we understand his counsel to insist, that inasmuch as he executed the indemnity bond to the sheriff, he is entitled to be considered as holding the money in the same manner as the sheriff held it—and that if it was there attached, it is in custody of the law, until the attachment is discharged. If all this is conceded, we think it very clear the *onus* is with the plaintiff to show the existence, in point of fact, of the attachment of the mo-

ney. There is no evidence that the money has ever been attached in the sheriff's hands, except the admission growing out of the recitals in the indemnity bond, and these certainly cannot bind Oliver. But if it was made to appear that the attachment recited in the bond was levied in 1840, the inference arising from the lapse of time is, that it was so disposed of as to discharge the lien. It was so ruled by this court in *Hobson v. Kissam*, 8 Ala. Rep. 363, under circumstances which in principle are not distinguishable from this point in the case.

Let the judgment be reversed, and the cause remanded.

HINES v. MULLIKIN.

1. An assignment of a note to W. N. H., "with said W. N. H. to try the insolvency of P. H. May," (the maker of the note,) imposes on the assignee the burthen of establishing the insolvency of May, by an action on the note against him.

Error to the County Court of Perry.

ASSUMPSIT by the plaintiff, against the defendant in error.

The action is founded on the indorsement of a note, made by one May to Forrest & Mullikin, for \$110, dated 29th January, 1838, and due ten days after date. The indorsement is in these words: "I sign the within note over to William N. Hines, for value received of him, with said William N. Hines to try the insolvency of the said P. H. May. November 21, 1839.

JOHN MULLIKIN."

The declaration contains five counts, some of which charge the insolvency of May, and notice to the defendant, but none of which charge the prosecution of a suit against him.

The defendant demurred to all the counts of the declaration, and the court sustained his demurrer, and rendered judgment for the defendant.

This is now assigned as error.

DAVIS, for plaintiff in error, cited *Jordan v. Garnett*, 3 Ala. 610; *Hall v. Chilton*, Id. 633; *Milton v. De Yampert*, Id. 648; *Douthit v. Hudson*, 4 Id. 610; *Davis v. Campbell*, 3 Stew. 319; *Story on Bills*, 460, 480.

A. GRAHAM, of Perry, contra, cited *Trotter v. Crockett*, 2 Porter, 401; *Pollard v. Murrel*, 6 Ala. 661; *Cumpton v. McNair*, 1 Wend. 457.

ORMOND, J.—It is extremely difficult to lay down general rules, applicable to irregular indorsements such as this, inasmuch as they are special contracts, and each must be governed by the intentions of the parties, so far as that can be ascertained from the language employed. That is frequently a matter of great difficulty, where, as in this case, if the parties had any definite idea of the contract they were making, they have been singularly unfortunate in the language employed by them in setting it out.

In *Nesbit v. Bradford*, 6 Ala. 749, we considered that where the security upon which an imperfect indorsement was written, may be the subject either of assignment or indorsement, the imperfect indorsement will be governed by the same rules as those which apply to perfect indorsements; and that the same diligence is necessary to charge an indorser, as would be necessary if the indorsement was perfect; but that a suit is unnecessary whenever the maker is unable to pay by reason of insolvency.

That rule, if applicable to this case, ascertains the sufficiency of this declaration, as some of the counts charge the insolvency of the maker of the note, as an excuse for not bringing the suit against him, which our statute requires, to fix the liability of the assignor of a note not mercantile in its

character. But we think that the parties had in view the insolvency of the maker, when this indorsement was made, and intended to make some provision in relation to it—in the language of the indorsement, "*Hines was to try the insolvency of May.*" It is not in our opinion a reasonable construction of this language, that the insolvency of May was to be tried by a suit upon the indorsement. Upon that hypothesis, the indorser was liable to an action upon it, as soon as it was made, and might as well have given his note at once. The reasonable construction appears to us to be, that Hines was to ascertain, judicially, that May was insolvent, before the assignor was to be liable upon his assignment. In no other way could May's insolvency be ascertained by Hines, than in a suit carried on by him. Nothing else which Hines could do, would furnish a certain test of the existence of the fact, upon the ascertainment of which the liability of the assignor was to attach; for we think it perfectly clear, that it was not the understanding of the parties, that his liability commenced the moment the contract was made, and such being the construction of this indorsement by the county court, its judgment must be affirmed.

KNIGHT v. TURNER'S EX'R.

1. Where in an action on a promissory note given for the purchase money of land, the plaintiff consents to receive pleas informally and briefly stated upon the papers, thus: "Failure of consideration. Fraudulent representation, by which the defendant was induced to make the purchase of plaintiff's testator," and merely denies their truth by replications on which issues are submitted to a jury; it will be intended that the pleas severally alleged such facts as established in point of law a failure of the consideration for which the note was given; and a fraudulent representation by the testator in respect to the consideration which induced the defendant to

make the contract; and that the defendant was in a condition to avail himself of such defences. Evidence on the part of the defendant, which does not support these issues should therefore be rejected.

2. Where the purchaser of lands accepts a deed with the usual covenants of warranty, takes possession and retains it, he cannot resist the payment of the purchase money by defence at law to an action brought for its recovery.

Writ of Error to the Circuit Court of Macon.

THIS was an action of assumpsit at the suit of the defendants in error, to recover the amount of a promissory note made on the 7th October, 1843, by which the plaintiff promised to pay to their testator, \$1,065 on the first day of January, 1846. The cause was tried by a jury, a verdict returned for the plaintiffs, and judgment thereon rendered.

From a bill of exceptions sealed at the defendant's instance, it appears that it was admitted, the note sued on was given for the purchase of a tract of land, which the defendant made of the plaintiff's testator. At the time of the purchase, a deed with the usual covenants of warranty was executed, and the defendant took possession and still retains it.

The defendant then offered to prove, that previous to the consummation of the contract, as well as when it was completed, he said to the testator that he would not purchase an unhealthy place, but wanted a healthy location for a family residence; to which the testator remarked, that the lands in question were unobjectionable, as it respected the healthfulness of their situation. He further proposed to show, by testimony, that they had been unhealthy, that the testator was aware of it—and, in fact, his family had been very sickly immediately before the sale to him, and that the unhealthiness of the location had induced the testator to sell. It was also proposed to show, that the testator, immediately after the sale by him, purchased other lands in the same neighborhood, and that the tract sold to the defendant had been very sickly ever since he became its proprietor. All which testimony thus offered by the defendant was excluded by the court.

G. W. GUNN, for the plaintiff in error, insisted that the ev-

idence offered by the defendant was admissible, that it tended to establish fraud and deceit on the part of the testator; and notwithstanding the defendant's uninterrupted and continued possession, the defence was available at law. [3 Stew. & P. Rep. 99; 1 Sergt. & R. Rep. 42; 11 Johns. Rep. 50; 1 N. & McRep. 78; 2 Id. 184, 186, 189; Sugden on Vend. 639; Doug. Rep. 654; Fonb. Eq. 362; 9 B. & C. R. 522; 3 Porter's Rep. 355; 4 Id. 431; 9 Id. 675; 13 Johns. Rep. 257, 302; 15 Id. 230; 3 Stew. & P. Rep. 322; 12 Wheat. Rep. 183; 4 Mass. Rep. 502; 3 Stew. & P. Rep. 330; 1 Bay's Rep. 250, 376; Powell on Con. 147 to 149. 1 McC. Rep. 122; 1 Dess. Rep. 433; Gilmer's Rep. 159.]

Cullum v. The Branch Bank at Mobile, 4 Ala. Rep. 21, and Stark, et al. v. Hill, 6 Id. 785, are unlike the present. There the fraud related to the title, in respect to which there were covenants of warranty; but here the covenants do not stipulate to answer for the fraud.

The evidence was adapted to the pleadings, and whether the pleas were good or not, it should have been admitted. [2 Stew. Rep. 433; 3 Porter's Rep. 287.]

S. F. RICE, for the defendant in error, cited 3 Ala. Rep. 406; 4 Id. 21, 99; 6 Id. 785, and insisted, that if the defence relied on by the proof was available, it must be asserted in equity.

COLLIER, C. J.—The pleas upon which the record affirms the cause was submitted to the jury, are—"1. *Non assumpsit*. 2. Failure of Consideration. 3. Fraudulent representation, by which the defendant was induced to make the purchase of plaintiff's testator." The form of the first plea is indicated by its title; but the most liberal construction that can be indulged in respect to the second and third, as they were received by the plaintiff, is, that they severally alleged such a state of facts as established in point of law a failure of the consideration for which the note was given, and a fraudulent representation by the testator in respect to the consideration, which induced the defendant to make the contract, and that the defendant was in a condition to defeat the the action, by showing such fraud. In this view it is perfectly

clear, that the pleas do not tolerate the admission of illegal evidence, and that no testimony was competent which does not tend to make out a legal defence, coming within the issues as we have supposed them to be framed. The question then is, does the evidence offered furnish a bar to the plaintiff's right to recover, either in whole or in part.

In *Cullum v. The Branch Bank at Mobile*, 4 Ala. Rep. 21, it was held, that where a contract for the sale of real estate has been executed by the acceptance of a conveyance by the purchaser, fraud does not constitute a defence at law in an action for the purchase money; but the remedy of the vendee is in equity. At an early day it was decided by our predecessors, that where the purchaser had taken possession and received a conveyance from the vendor, he could not resist the payment of the purchase money by proving that the latter made fraudulent representations as to his title. [1 Stew. Rep. 490.] This decision has never been departed from, but repeatedly recognized by us. In *Dunn v. White & McCurdy*, 1 Ala. R. N. S. 645, we determined that a partial failure of consideration was not an available defence to an action for the purchase money of lands of which the purchaser retained the possession. And even in respect to personal property, we have decided that, if the vendee does not rescind the contract upon discovering the vendor has committed a fraud, he cannot avoid the payment of the purchase money *in toto*—the deduction, *if any*, can only be to the extent of the injury which the vendee has sustained by the fraud. [2 Ala. Rep. 181, 749; 3 Stewt. & P. Rep. 322.]

This view of the law, as ascertained by our own adjudications, is conclusive to show, that the evidence offered by the defendant at the trial, is no answer to the action and could not reduce the plaintiff's recovery below the amount of the note. *If he has a remedy in any forum*, a question which we need not now consider, it must be asserted in equity. The judgment is consequently affirmed.

LOCKET v. CHILD.

1. When one is summoned as a garnishee of joint judgment debtors, the service of the garnishment operates as the attachment of debts due to the defendants severally, and consequently there is no error in propounding an issue that the garnishee is indebted to one of the joint debtors.
2. A question with reference to the continuance of a cause cannot be revised in an appellate court. All such matters are purely of discretion, and will not be revised, although the court may have mistaken the rights of parties as to compelling the personal attendance of a witness. Independent of this, the remedy for an improper refusal to compel the attendance of a witness, is conceived to be by mandamus.
3. When the witness will be responsible to one of two persons, no matter which way, the verdict is a case of balanced interest as presented, and the witness competent.
4. Parol evidence is admissible to show that the assignment of a mortgage to one by name was intended for the benefit of another as well as himself.
5. The costs of the suit against the principal debtor do not constitute any part of the costs against the garnishee, but become part of the debt, and as such, are recoverable if the garnishee is indebted a sufficient sum to cover them as well as the principal debt.

Writ of Error to the County Court of Perry.

GARNISHEE suit by Child as the judgment creditor of William and Frederick Hartley against Locket. The affidavit asserts that Locket is indebted to William Hartley and Frederick Hartley. The answer of the garnishee asserts that he does not consider himself indebted to William Hartley, and proceeds with the statement of the transaction by reason of which the indebtedness is alledged on the other hand. The plaintiff filed the contestatory affidavit, that he believed the answer was incorrect, and thereupon the court ordered an issue to try whether the garnishee was indebted to William Hartley. The answer was filed at July term, 1843, and the cause was tried as well as continued several times. At the February term, 1846, the garnishee obtained leave to file an amended answer, in which he denied he was indebted to *William and Frederick Hartley*. The plaintiff then filed

an affidavit asserting this was incorrect, and by order of court an issue was tendered asserting the indebtedness of Locket to William Hartley. To this issue the plaintiff demurred, but was overruled by the court. A verdict was found ascertaining that Locket was indebted to William Hartley in a sum exceeding that of the judgment of the plaintiff against William and Frederick, and judgment was rendered that the plaintiff recover of the garnishee according to the verdict.

At the trial, Locket moved to continue the suit on the ground that a material witness was absent, but the witness being a practising physician, and the court ruling that the absence of such a witness was no ground for continuance, as his deposition might have been taken, refused the motion. The plaintiff at the trial introduced one John Hartley, the brother of the defendant in execution as a witness, and he testified that he was indebted to one McCraw about \$800, which was secured by a mortgage on two slaves; that McCraw was about to sell the slaves to satisfy the debt, when witness applied to Locket to aid him, and said his brother, the defendant in execution, had a claim against one Gary, the son-in-law of McCraw, which McCraw would take as cash. This claim was a note on Gary, in the hands of one Nave for collection. Witness had tried to get this claim from his brother, but could not. Locket saw William Hartley, and told John to go to him and he could get it, and to have it indorsed to himself, after which, by indorsing it himself, and leaving it with Locket, he could take up the mortgage. Witness got the note from his brother, who would not however indorse it. Witness gave it to Locket, who passed it to McCraw as so much money in payment of the mortgage, and took from McCraw an assignment of the mortgage. Witness had not paid his brother for the claim on Gary, and did not consider himself bound to his brother. Understood that Locket was to be responsible to William. Locket at the same time paid to McCraw about \$400. Locket sold the slaves under the mortgage—appropriated the money, first to refund the money he had advanced, and applied the remainder to discharge the \$400 due by witness to him, and denied his responsibility to William for any thing. Witness denied

the right of Locket to do so, and says he never gave him any authority—had not paid him the \$400—did not agree to pay it—considered he had paid Locket for his brother the worth of his brother's claim on Gary, and that Locket was bound to his brother—that Locket, and not himself, was to pay William—and did not consider himself as owing either of them any thing, as his property had been sold at or under value, and Locket had got it, and in it had enough to pay all the debts. The question was whether Locket was indebted to William Hartley for the amount of the Gary note. The garnishee objected to the competency of this witness, but the court allowed him, on the ground that his interest was balanced. The assignment of the mortgage by McCraw to Locket contains no condition, and the plaintiff offered to show by parol that it was made for the benefit of William Hartley, as well as for the benefit of Locket. The garnishee objected to this evidence as varying the assignment, but the court allowed it. The garnishee excepted to the several rulings of the court against him.

A second bill of exceptions is sent up with the transcript, which bears date after that which has been set out, and it is said to have been filed by the plaintiff in the cause, although the exceptions are on the part of the garnishee. It states the facts with somewhat more detail than the other, and explains some parts of the first, which without this, would appear obscure.

GRAHAM of Perry, for the plaintiff in error.

MOORE and GARROTT, contra.

GOLDTHWAITE, J.—1. The garnishee insists that he is called on to answer only what he is indebted to the defendants jointly, and that it was irregular for the court to compel him to join issue on his indebtedness to one of them only, and that no judgment can be rendered on the verdict ascertaining such indebtedness. No authority has been cited to sustain this position, and we are constrained to think it untenable. There is no question that an execution on a joint judgment binds the separate goods of each defendant, and there seems no good reason why garnishee process should

not reach the separate debts in a similar manner. In *Tillinghast v. Johnson*, 5 Ala. Rep. 514, we say, "the levy of an attachment on property is a substitute for, and precisely equivalent to service of personal process, and such levy creates a lien on the property attached, whether it be a chattel seized by the sheriff, or a debt in the hands of a garnishee."

It is true that there we considered a debt due from an estate represented by the garnishee as its executor, was not attached by process of garnishment against the individual, but this decision proceeds on the ground that the debt is not due from him, but from the estate which he represents. Here, on the contrary, the debt is due from the garnishee to one of the debtors, and if instead of a debt, the thing attached was a chattel, there would be no doubt it would be bound, although belonging to one of the debtors only. It can scarcely be supposed that if a garnishee was to answer that he had the personal effects of one of the debtors in his possession, these would not be bound, and why should a different rule obtain when the subject of garnishment is a debt? We think the reasonable construction of the attachment law is, that the service of garnishee process, where there are joint defendants, has the effect to create a lien on debts due to each of the defendants separately. The consequence of this opinion is, that the answer of the garnishee should have negatived the existence of indebtedness to either of the defendants, and therefore, although it would have been more proper to have required such an answer, there was no injurious error in requiring the garnishee to join in the issue propounded, or in giving judgment on the verdict.

2. The question as to the continuance is one which cannot be revised in an appellate court. All such matters are purely of discretion, and not the subject of revision, although the court may have taken a mistaken view of what were the rights of the parties, to compel the personal attendance of the witness. Independent of this, if the court had refused improperly to compel the attendance of a witness, it is conceived the remedy would be by mandamus.

3. The ground assigned as a reason why the witness should have been rejected is, that he shows himself to be an agent in the transaction between Locket and William Hart-

ley, and that *prima facie* he is bound to William Hartley for the value of the note on Gary. From the obscurity of the bill of exceptions, there is some difficulty in ascertaining, without the aid of the second, what was the motive which induced Locket to aid the witness in the mortgage transaction. We infer from the statement of what the witness said, that debts were due both to McCraw and Locket, but that the former had the priority of lien. Assuming this to be the case, the note of Gary, if lost to the witness, created a debt there, and if lost to Locket, left the debt due by the witness to him, undiminished to the same extent. It is then clear, that however the suit may result, the witness is still the debtor, either to his brother or to Locket, and thus a case of balanced interest is presented, which, according to all the cases, lets in the witness. [Hallet v. O'Brien, 3 Ala. R. 455.]

4. The allowance of parol evidence to show that the assignment of the mortgage by McCraw was made as well for the benefit of William Hartley as of Locket, does not seem to us to be liable to exception on the ground that it varies the effect of the instrument. The effect of the assignment is to aid in conveying the title of the slaves to Locket, but the object for which the title is conveyed is as much open to explanation as it would be if these had been conveyed by any other mode of assurance. When therefore it was proposed to be shown that the assignment was for the benefit of Hartley in part, it was nothing more in effect than the recognition by Locket, that a part of the funds paid out to McCraw were derived from that source. We think the evidence was properly admitted.

5. There is one other objection to the judgment. It is said the garnishee is not responsible for the costs of the suit against the principal debtors. He certainly is not thus responsible, as constituting a part of the costs of the garnishee suit, but as these costs form a part of the debt which is owing to the plaintiff, and as the debt which the garnishee owes is sufficient to cover these as well as the principal sum, he was rightfully condemned to pay them, and will be allowed their amount as a payment to Hartley, the debtor.

There seems to be no error in the record. Judgment affirmed.

HEMINGWAY v. MOORE AND CRENSHAW.

1. A non-resident cannot sue out an attachment against the property of a deceased non-resident debtor.

Writ of Error to the Circuit Court of Lowndes.

THE action was commenced by attachment, by the plaintiff in error, who made affidavit that he was a resident of the State of Mississippi, and that Andrew Hutchinson, deceased, of South Carolina, was in his lifetime indebted to him in the sum of \$1,653 15, that John S. Moore and Ephraim A. Crenshaw are his administrators, and reside in South Carolina, and have not sufficient property of the estate of their intestate in the State of South Carolina, to satisfy the debt or demand, &c.

Bond was given, and an attachment issued, returnable to the circuit court of Lowndes, which was levied on a debt in the hands of T. M. Williams, who was summoned as a garnishee.

The court, on motion, quashed the attachment, and this is now assigned as error.

J. D. F. WILLIAMS, for the plaintiff in error, contended, that all the rights secured to resident creditors are given to non-resident debtors. [Clay's Dig. 57, § 9.]

ORMOND, J.—The question presented on this record whether a non-resident of this State, can levy an attachment on the property of a deceased non-resident, found within this State, was determined by this court in *Loomis v. Allen*, 7 Ala. R. 708, where it was held that the remedy by attachment, in that particular case, was given only to resident creditors.

Such is still our opinion. The statute authorizing attach-

ments to issue in such a case, (Clay's Dig. 58, § 14,) passed in 1807, and it is evident from the phraseology employed in the act, was intended only to apply to those cases, where a debtor residing in this State, removed from this State, and died, having left property within this State; and the object of the law seems to have been, to give the resident creditor a remedy for his debt, without taking out letters of administration.

The law giving to non-resident creditors the benefit of the attachment law against non-resident debtors, passed in 1824, (Clay's Dig. 57, § 9,) but we think it is clear it was not intended to give them the benefit of this particular law. It is confined by the terms of the act to cases where the non-resident debtor "removes his property into, or holds property in this State." With no propriety can this language be applied to the foreign executor or administrator, for if the property had ever come to his possession, it would not be subject to the attachment of the resident creditors, as was held in the case of *Loomis v. Allen*, *supra*. Further, the creditor suing out the attachment, is required to swear, that the defendant has not sufficient property in the State of his residence, to satisfy the debt, language which could not have been employed by the legislature, if they had in view the case of a deceased non-resident debtor.

The act of 1807, is, to say the least, one of doubtful policy, and is by its express terms, confined to cases where one contracting debts in this State, removes, leaving property behind him, and dies. In such a case, it seems to have been considered by the legislature proper, that the creditors of the deceased should have a remedy against the property, instead of compelling them to take out letters of administration, or seek payment from the foreign administrator. No such considerations apply in the case of the foreign creditor, and there is therefore no hardship in requiring him to take out administration, if he desires to subject property of the deceased in this State to the payment of his debts. Our conclusion is, that this case is neither within the letter or the spirit of the

act of 1824, giving the remedy by attachment to non-residents against non-residents, and the judgment of the court quashing it must be affirmed.

CLAIBORNE v. HARRIS AND ANOTHER.

1. Quere? Are not the acts of 1807 and 1811, which authorize a defendant to require a non-resident plaintiff to give security for costs, to be construed *in pari materia*, as parts of an entire system, and is not the same notice necessary to be given under the latter as under the former enactment?
2. A note made by the judge on his docket, stating the plaintiff was shown to be a non-resident, and that he give security for the costs before the next term, or the cause be dismissed, is merely directory to the clerk, and from it he may complete his minutes; yet it is not in itself a notice to the defendant of the requisition for security. But if the entry is perfected by being transferred to the minutes of the court in proper form, it is a sufficient compliance with the statute.

Writ of Error to the County Court of Benton.

THIS was an action of assumpsit at the suit of the plaintiff in error. From a bill of exceptions certified to this court, it appears, that when this cause was called for trial, at the July term, 1846, of the county court, the plaintiff announced himself ready for trial; thereupon the defendants moved the court to dismiss the suit, because no security had been given for costs, and produced the trial docket for January term last preceding, on which was entered opposite the names of the parties, in the hand-writing of the judge, the following: "Plaintiff shown to be a non-resident, security for costs before the next term of this court, or cause dismissed." This order was never transferred to the minutes of the court, and no other notice being proved, the court required the plain-

tiff's attorney to give security for the costs, which he refused to do. Thereupon the court dismissed the suit, and judgment was so entered. To all which the plaintiff excepted, &c.

T. A. WALKER, for the plaintiff in error, insisted, that the note on the judge's docket was no notice to the plaintiff—perhaps it was a sufficient warrant for an entry *nunc pro tunc*, but when this was made, the plaintiff's suit could not have been dismissed, until after the expiration of the time prescribed by the statute; and then only upon the failure of the plaintiff to comply.

S. F. RICE, for defendants. The order upon the judge's docket was sufficient, though it never was transferred to the minutes of the court. It must be presumed, that the plaintiff was aware of it, as a party in legal contemplation is always in court, and is charged with a knowledge of what transpires in a cause. He did not pretend ignorance of the order, and the statute does not prescribe any particular form of notice. [Clay's Dig. 316, § 26; 6 Ala. Rep. 103.]

COLLIER, C. J.—The ninth section of the act of 1807, entitled "an act establishing the fees of the several officers therein named, and for other purposes," enacts that every action at common law, &c. commenced in the name of any person residing out of this State, shall be dismissed if security be not given with the clerk of the court from whence the process shall issue, or wherein it shall be depending, within sixty days after the notice shall, at any time during such non-residence have been given to the plaintiff, or his attorney that security is required, for the payment of the costs that may be awarded to the defendant, or may become due to the officers of the court. [Clay's Dig. 316, § 26.] And the ninth section of a statute of the same date, entitled "an act regulating the mode of summoning juries, and for other purposes," provides, that when process shall issue by the direction of an attorney, from any of the courts of this State, in favor of a non-resident against a person residing within the same, the person suing out such process, or prosecuting the

suit, at the return thereof, or any time thereafter when required, shall upon motion, be ruled to give security for all costs accruing in such action, &c.; and if the attorney, upon being required, shall fail to give security, the suit shall be dismissed, and the execution shall issue against him for all costs. [Clay's Dig. 317, § 27.]

The act of 1811, provides, if a plaintiff shall remove out of this State, after the commencement of his suit, he may be required to give security for costs, &c. [Clay's Dig. 317, § 28.]

We incline to the opinion that these several enactments are to be considered *in pari materia*, as parts of an entire system; and though the second does not *in totidem verbis* prescribe any definite period, which shall intervene between the requisition of security and the dismissal of the suit, in the event of non-compliance, yet we think the notice provided by the first will regulate a proceeding under it. But it is not necessary to consider this question in the case before us, because it does not appear the process was directed to issue by an attorney, or that the plaintiff was not a resident when the suit was commenced; either of which would furnish an answer to an attempt to charge the attorney with the costs.

The question then is, can the note made by the judge on his docket, be regarded as a notice within the meaning of the section first cited. This provision points out no particular mode in which the defendant shall give notice to the plaintiff, or his attorney, of the requisition for security; but we entertain no doubt that it must be positive, or in such form that knowledge in point of fact may be implied. An entry upon the minutes of the proceedings of the court has in practice been considered as sufficient, upon the ground that a party is in law presumed to be cognizant of the action of the court upon his case, from the commencement to its termination. But in the absence of express notice, such presumption is indulged only where the proceedings are evidenced by being placed upon the record. The *memoranda* which the judge writes upon his docket, is merely directory to the clerk, from which he is to make up and complete his minutes; and where sufficiently full to be intelligible, authorizes an entry

at a subsequent term *nunc pro tunc*. But in itself it cannot be regarded as a record, so as to charge parties with knowledge of what may there appear. The case of *Lyons v. Long*, 6 Ala. Rep. 103, contains nothing adverse to this view. What we have said sufficiently indicates the error of the ruling of the county court—its judgment is consequently reversed and the cause remanded.

WATSON, ET AL. V. BOTHWELL, ET AL.

1. A court of equity has no jurisdiction to decide on the validity of a will, either of personal or real estate, at the instance of the heir at law.
2. The allegation that the complainants have just cause to fear, and do fear the defendants will remove certain property bequeathed by a will alledged to be void, will not confer jurisdiction on a court of equity in the absence of allegations that the complainants have applied or intend to apply for letters of administration on the estate.
3. The mere circumstance that the devisee under such a will has possession of the title deeds for lands of the testator, will not warrant the heir at law in filing a bill to have them delivered to him.

Writ of Error to the Court of Chancery for the forty-first District.

THE bill is filed by Watson and others, claiming to be heirs at law and next of kin of William Watson, deceased. It alledges that the decedent in his lifetime was possessed of certain described lands, slaves and other personal estate; that he was old, and infirm in bodily health, and for years previous to his death addicted to intemperance; that the defendants, Bothwell and Anderson, taking advantage of his weakness, procured him to make a pretended will some short time before his death, by which he devised and bequeathed the greater portion of his property to the defendant Anderson, as well as one slave to the defendant, Bothwell; that in

point of fact and law, the said Watson at the time of making this pretended will, was *non compos mentis*; that Bothwell and Anderson are in possession of the property of the deceased, and are either actually insolvent or will soon be so; that they, nor either of them, have ever presented the said pretended will for probate; and the complainants alledge that they have good reason to fear, and do fear that if the said defendants are not restrained, they will remove the slaves and other personal property without the jurisdiction of the State.

The prayer of the bill is, that the defendants may be required to produce the title papers of the real estate; that they may be restrained from removing the property out of the State, and that it may be seized and held until an administrator shall be appointed; and that the pretended will may be delivered up and canceled.

The chancellor dismissed the bill for want of equity, as well as dissolving the injunction which had been awarded by a circuit judge. The dismissing of the bill is now assigned as error.

POPE, for plaintiffs in error, insisted—

1. The bill is maintainable *quia timet*. [Bryant, et al. v. Peters, et al. 3 Ala. Rep. 160, and cases there cited; Leavins v. Butler, et ux. 8 Por. 396, et seq. and cases there cited; Roberson v. Roberson, at this term; 2 Story's Eq. 130, § 826.]

2. "It is a settled principle of a court of equity, that an executor, or other trustee who mismanages, or puts in jeopardy a trust fund, by his insolvency, either existing or impending, should be prevented from further interfering with the estate." [Elmendorf v. Lansing, 4 Johns. Chan. Rep. 565; Leavins v. Butler, et ux. 8 Por. 400, 401.]

3. Executors and administrators are in almost every respect considered in equity, as trustees. [Leavins v. Butler and wife, 8 Por. 397, and cases there cited.]

4. "If the rights" of parties in interest "are in jeopardy," "a court of equity will protect them by making the necessary orders." It will "bring all persons in interest before it, and make a definitive disposition of the claims of all parties."

Watson, et al. v. Bothwell, et al.

[Leavins v. Butler and wife, 8 Porter, 401.] Under the facts stated in this bill, plaintiffs' rights as heirs at law, were "in jeopardy," and this gave chancery jurisdiction [Bryant, et al. v. Peters, et al. 3 Ala. Rep. 160; Leavins v. Butler, et ux. 8 Por. 396 to 401, and cases there cited.]

5. The power given to orphans' courts over estates of deceased persons does not entirely divest chancery of jurisdiction. "The general rule is that chancery has a concurrent jurisdiction with the ecclesiastical courts, in all cases, and whichever court is first possessed of the cause has the right to proceed," and this too when the validity or invalidity of a will is involved. [Harrison v. Harrison, et al. 9 Ala. Rep. 470; 4 Burns' Eccl. Law, 266; Blakey's Adm'r v. Blakey's Heirs, 9 Ala. Rep. 394; see also, James v. Scott, 9 Ala. Rep. 586; Planters' and Mer. Bank v. Walker, et al. 7 Ala. Rep. 945; Gayle, et al. v. Singleton, 1 Stew. Rep. 566; Story's Eq. § 64 to 71; 9 Wheat. Rep. 932; 13 Peters' Rep. 151.]

6. Chancery does not *derive* its jurisdiction over the estates of deceased persons, when a proper case is made, solely from the statute, (Clay's Dig. 598, § 15,) but it has jurisdiction by virtue of its *general* powers to prevent irreparable injury. [Leavins v. Butler and wife, 8 Por. R. 396-7.] This statute gives jurisdiction in some cases, but principally it only limits the time within which that jurisdiction may be exercised in cases of wills which have been admitted to probate. [Glasecock, et ux. v. Johnson, et al. 2 Ala. Rep. 218; Elliott v. Mayfield and wife, 3 Ala. 223; Bryant, et al. v. Peters, et al. 3 Ala. Rep. 160.]

7. This bill should have been at least retained until the issue of *devisavit vel non* had been tried in the orphans' court, and administration granted there and the property accounted for to such administrator as might be appointed, if the issue was found in favor of the heir at law. [Roberson v. Roberson, at this term; Bryant and others v. Peters and others, *ut supra*.]

CHILTON, for the defendant, contended, 1. The bill is filed to contest a will of personal and real estate, before it has been admitted to probate. The rule is well settled, both in England and in this country, that the validity of a will of real

estate must be tried at law, and of personal estate in the court having jurisdiction of probate of wills. [Story's Eq. Pl. p. 374 § 474; 3 Meriv. R. 161; 2 Story on Eq. § 1445, 1448; Cooper's Eq. Pl. 125; Story's Eq. Pl. 607 § 788; 8 Ves. 89.]

2. The bill asks the production of title deeds, but complainant is not entitled to them unless the will is set aside. There being no action pending to try the title, they are in no way necessary to enable complainants to secure their right. [3 Meriv. R. 172; 4 Ves. 66.]

3. There is no action pending to try the right at law, or in the probate court: the injunction to stay waste, and to prevent the removal of the property is but consequential upon the relief sought. If the relief fails, the court cannot sustain the bill upon the ground that the property may be removed, &c. [8 Ala. R. 669.]

4. Besides, the orphans' court, which alone has primary jurisdiction, is fully adequate to protect the rights of all parties, and to this end is wisely invested by our statutes, with plenary powers. [Clay's Dig. 222, § 10.]

5. But if the party had the right to resort to chancery to enjoin the devisees from removing the property, some *reason* for invoking the exercise of this extraordinary power should be stated, other than the insolvency of the devisees. "That complainant has reason to fear, and does fear the property will be removed," is too vague and indefinite to warrant such an interposition of chancery. To hold such sufficient, would be to permit the groundless apprehensions resulting from the morbid sensibilities of the hypochondriac, supply the place of *substantial* allegation. [3 Ala. Rep. 251.]

6. An injunction will not lie to change the possession of the subject while the right remains undetermined. [Hopk. R. 114.] Upon the same principle, a creditor at large, or before judgment, cannot enjoin even the fraudulent disposition of the debtor's estate. [2 Johns. C. R. 144; 7 ib. 206.]

GOLDTHWAITE, J.—1. The complainants insist that their bill is maintainable on three distinct grounds: 1. To set aside the pretended will because of the fraud in procuring it to be made, or on account of the want of capacity to make it. 2. To prevent the injury which might arise if the personal

estate were withdrawn from the jurisdiction of the court. And 3. Because they are entitled to have the title deeds for the real estate, to enable them to test their right at law. We shall consider the case in each of these views.

It is so well settled that one claiming a right adverse to a will, has no claim to come into chancery on the naked ground to set it aside, that scarcely a decision to the contrary can be found in the books. In *Jones v. Jones*, 3 Merri-
vale, 161, the complainant, as heir at law, sought to set aside a will on grounds very similar to those urged here, but Sir William Grant said it was impossible it could be made a serious question, that the validity of a will either of real or personal estate is to be determined in a court of equity—that although there may have been instances of issues directed on the bill of an heir at law, when no opposition had been made to that mode of proceeding, yet he apprehended the heir at law could not insist on any such direction. [See also, 1 Story's Eq. § 184, 440.] It is only in suits to establish a will against the heir at law, that he is entitled by the course of equity law, to demand an issue, and it only when in such a suit the will is established, that the heir at law will be restrained from his legal right to control it. [2 Story's Eq. § 1445 to 1449.] The bill cannot therefore be sustained to set aside the will.

2. We apprehend the jurisdiction of chancery to interfere so as to prevent personal estate from being withdrawn from the jurisdiction pending a controversy either with respect to the probate of a will or in relation to the administration, is within its admitted powers. The origin of this jurisdiction most probably was the defect of power in the ecclesiastical courts to provide a remedy for the evil, but with us, the orphans court, by statute, is authorized to grant administration "during any contest about the validity of a will, the infancy or absence of the executor or administrator, and in such other cases not otherwise provided for, with such limited authority as the case may require, and when the necessity of the case may require, such administration may be granted forthwith, without any citation." [Digest, 222, § 10.] In view of this statute, it is difficult to conceive of any case in which a necessity can exist for the application to the pre-

ventive power of a court of equity, unless it be when the orphans' court refuses to make an appointment to meet the specific emergency; as, after the appointment, the administrator would possess the necessary means, by a suit at law to prevent the removal of the property by taking it into his possession, or by suing for it by the statutory action of detinue. Without undertaking, however, to say, that a bill to restrain the removal of personal property pending the litigation, will not lie in peculiar cases, we are satisfied this cannot be sustained on this ground, because there is no sufficient allegation in the bill, that the complainants have applied, or intend to apply, for letters of administration. As the ground upon which equity assumes jurisdiction is, to protect the property *pendente lite*, (Atkinson v. Henshaw, 2 V. & B. 85; Ball v. Oliver, Ib. 96; King v. King, 6 Vesey, 172;) it is evident the fact of litigation, whether actual or contemplated, should be stated before a bill will hold on this foundation. In this respect the present bill is entirely defective, and there is no allegation on which it can be sustained as a bill to prevent a future injury.

3. In relation to the other ground asserted as sustaining the bill, it falls within the same category as the last. Conceding that cases may exist in which the heir at law might call for the exhibition of title deeds, against the devisee, it is certain a foundation must be laid to induce a court of equity to compel their production. As to these deeds, the complainants, as is said in Jones v. Jones, 3 Merivale, 161, stand solely on their title as heirs, and if they cannot set aside the will, they have nothing to do with the deeds.

The only point in the case on which we have entertained the least doubt, is the second one before noticed, and being now satisfied that is clear for the defendants, we affirm the decree.

TRAMMELL AND McCARTY v. GORDON.

1. A wager on the Presidential election, consummated by the execution of a deed for a tract of land by G. to T. and the execution by the latter, to the former of promissory notes, for the value of the land, promising to pay when James K. Polk was elected President of the United States, is forbidden by law, and both the deed conveying the land, and the notes are void. On the one hand, no recovery can be had on the notes, and on the other, the land may be recovered by the appropriate action.

Error to the Circuit Court of Dale.

ASSUMPSIT by the defendant in error, against the plaintiffs in error, and one Simmons, on two promissory notes of the following tenor:

\$920. When James K. Polk is elected President of the United States, we, or either of us, promise to pay Alexander C. Gordon, the sum of nine hundred and twenty dollars, for value received, this 9th October, 1844.

M. C. TRAMMEL,
PHILIP McCARTY,
E. H. SIMMONS.

The writ was not executed upon Simmons, and as to him the suit was discontinued. Upon the trial of the cause, as appears from a bill of exceptions, it was proved that the note above described, and another of the same amount, were executed by the defendants, and at the same time the plaintiff executed to M. C. Trammel, a deed to a tract of land in Henry county, which was proved to be worth in cash \$1760, and that nothing was to be paid for the land in the event Mr. Polk was not elected President of the United States. Trammel appointed an agent, and instructed him to rent out the land, and after the election of Mr. Polk, offered to rescind the contract. McCarty signed the notes as surety of Trammel. The court excluded these notes from the jury as illegal and void. But other proof being made, showing that the notes

contained the real consideration of the contract, the court charged, that if they belived Gordon had made a deed of his land to Trammel, without intending it as a gift, and had received no pay for it, he would be entitled to recover from the person the value of the land, at the time of the sale.

The counsel for defendant moved the court to charge, that the deed from Gordon to Trammel was void. That if the consideration of the note was as above stated it was in law a wager, and the plaintiff could not recover; and further, that upon the proof there could be no recovery upon the common counts. Also, that there could be no recovery against McCarty, upon the evidence; which charge the court gave, but also instructed the jury, that if there was any agreement in writing by him, subsequent to the purchase, they might find against him. To which the defendants excepted, and which they now assign as error.

BELSER, SAYRE and BUFORD, for plaintiff in error.

1. The agreement is a wager, void at common law because against sound policy. [See Bunn v. Richer, 4 John. 425; Lansing v. Lansing, 8 John. 354; Bush v. Reeler, 5 Wend. Tindall v. Childress, 2 Stew. & Por. 250; Givens v. Rogers, at this term.] Wagers on elections are void by statute also. [See Clay's Dig. 435, § 23; Chitty on Con. 695; Story Con. 128, § 200.]

2. But if not a wager, it is an illegal contract, which will not be enforced. [See Wheeler on Russell, 17 Mass. 258; 13 Pick. 521; Bunn v. Richer, 4 Johns. 425; Givens v. Rogers at this term.]

3. Courts will not aid either party in enforcing such a contract, be it executed or executory; or in recovering back that which may have passed under it. [See McGehee v. Lindsay, 6 Ala. R. 16; O'Donnell v. Sweeny, 5 Ala. 467; Black v. Oliver, 1 Ib. 449; Shippey v. Eastwood, 9 Ala. 198.]

4. The *true* test in such a case is, whether any aid is required from the *illegal* transaction to establish the case. [See Swan v. Scott, 11 Serg. & R. 164; Armstrong v. Tyler, 11 Wheaton, 258.]

5. The note sued on, and the deed executed, are parts of

the same illegal transaction. [See Sewal v. Henry, 9 Ala. R. 24; Clay's Dig. 257, § 1; 434, § 17.]

6. A recovery cannot be had on an *implied* contract, where an express one is proved, while unrescinded. [7 Mass. 107; Story on Con. 6, 7.]

7. Without the *aid* of the deed, the case is within the statute of frauds. No contract for the sale of land under that statute can be implied from circumstances. [Chitty on Con. 305; Blood v. Hardy, 3 Shepley, 305.]

8. McCarty received no consideration from which a promise to pay could be *implied*. [Givens v. Rogers, at this term.]

J. COCHRAN, contra.

Gordon sold to Trammel a tract of land, made T. a deed, and took T. and McCarty's notes for the land, payable when Polk should be elected President of the United States. Polk was elected, and Gordon sued T. and M. on the notes with common counts in his declaration. G. proved that T. had appointed an agent to manage the land for him.

The court charged the jury, that the notes were void. But if they believed from the evidence, that Trammel had bought Gordon's land, and that McCarty had induced Gordon to sell to Trammel, or that M. was a party to the purchase, then Gordon had a right to recover from the defendants, as much for the land as it was proved to be worth. The charge of the court is assigned as error.

The deed to Trammel from Gordon is valid; it is not made on any of the considerations mentioned in Clay's Dig. 257. This deed was not given for money lost or loaned, as provided by statute. If the deed is good, Gordon is entitled under the common counts, to recover its value. Because to establish his claim, Gordon did not have to prove an illegal transaction. He, G., could recover by producing the deed, and showing that T. went into possession, and that M. was a party to the purchase.

Again: The plaintiff may recover upon actions arising out of illegal transactions, which are *malum prohibitum* only. Unless it be directly upon the contracts, in which case he is

precluded. [Ex parte Bulmer, 13 Ves. jr. 213 ; see also, Hol-
loway v. Lowe, 7 Porter, 488.]

ORMOND, J.—The case of *Givens v. Rogers, et al.* decided at the present term, is fully in point as to the illegality of this contract, and also that there could be no recovery against the surety, if a promise could be implied, upon the refusal of the principal to deliver up the subject of the wager, as against him, and that the suit being against both, upon a joint promise, the recovery must be against all or none.

In that case, the subject of the wager was a wagon and harness ; in this it is a tract of land, for which a deed was executed to one of the defendants, at the time the notes were made, here sought to be enforced. Whatever may be the right of the winner, to recover the value of a chattel, which the loser refusing to pay his bet, withholds, it is manifest there can be no recovery upon an implied contract for the sale of land in a court of law, which is not in writing. But that opposes no obstacle to a recovery of the land in this case, if withheld from the true owner. The act of 1807 makes all conveyances founded on such a consideration as this, absolutely void. After enumerating a number of games, the act declares that all notes, bills, bonds, conveyances, &c. the consideration of which is money, or other valuable thing, laid or betted at any of the enumerated games, "or on any wager whatever," shall be utterly void, and of no effect, to all intents and purposes whatsoever; (Clay's Dig. 257, § 1,) and this being a wager, expressly prohibited by law, is within the precise terms of the statute.

The deed, therefore, which was executed in this case, being void, the real owner may recover the land by an action of ejectment, or trespass to try title.

From this it results, that the court erred in its charge to the jury, and its judgment must be reversed, and the cause will not be remanded unless desired.

WELCH v. JONES, AND ANOTHER.

1. It is not essential to the efficacy of a *supersedeas*, that it should be executed by a sheriff or other officer; but a delivery of the *supersedeas* by the defendant in execution or other person, to the officer who has in his hands the process to be superseded, is effectual for all legal purposes.

Writ of Error to the Circuit Court of Tuscaloosa.

THIS was an action of trespass, at the suit of the plaintiff in error, for the taking and carrying away certain goods and chattels. The defendant Jones pleaded *not guilty*, and his co-defendant pleaded *not guilty* and *justification*, as a constable, under executions. A verdict was returned for the defendants, and judgment was thereon rendered. On the trial, a bill of exceptions was sealed at the instance of the plaintiff from which it appears that after he had introduced his evidence for the purpose of proving the trespass complained of, the defendants proved that the defendant Jones had recovered two judgments against plaintiff before a justice of the peace; that executions regularly issued thereon, and were placed in the hands of the defendant, Abernathy, as a constable, to be executed, who levied on the property described in the declaration, and advertised and sold the same. Plaintiff then proved that he had regularly obtained from the clerk of the county court of Tuscaloosa, writs of *certiorari* and *supersedeas* to remove the judgments recovered by Jones, to that court, and to supersede the executions; that the *supersedeas* was handed by the plaintiff to Abernathy on the morning of the day of sale, and before the sale. The court charged the jury that no one but a lawful officer of the court, or some person deputed for that purpose, could serve a *supersedeas*.

E. W. PECK and L. CLARK for the plaintiff in error, insisted that a *supersedeas* may be assimilated to an injunction.

which may be served by any one. [Eden on Inj. 50.] The sheriff derives the authority to serve notices from the statute. [Clay's Dig. 337, § 138.]

P. MARTIN and B. W. HUNTINGTON for the defendants, contended that a *supersedeas* was a writ or process which must be served by some competent officer, and if delivered by a private person may be disregarded. [Clay's Dig. 535; 1 Mass. Rep. 488.]

COLLIER, C. J.—The writ of *supersedeas* is not addressed to a sheriff or other officer, to be served on him who holds the process, the action of which is to be suspended; but it is directed to the latter, informing him that the execution or other mandate has been superseded. It is a mere formal notice, and derives its legal efficacy from the order under which it issued; and is not indispensable to give effect to the order. Accordingly it has been held, that if a sheriff takes the goods of a person in execution after notice of the allowance of a writ of error, which operated as a *supersedeas*, he is liable to be punished for a contempt; and if an attorney take out execution after such notice, he is liable in the same manner. In *Morrison, et ux. v. Wright*, 7 Port. R. 67, the question was, whether knowledge that a writ of restitution issued upon a judgment in an *unlawful detainer* had been regularly superseded would render its execution void, and make the officer a trespasser, this court said, "It is true that the process in the sheriff's hands, became inoperative the moment it was superseded by the performance of the conditions imposed by the *fiat* of the judge, and all proceedings under it afterwards were void. But it by no means follows that the sheriff was a trespasser; any act of his, under, or by virtue of the process, after notice of the *supersedeas* would constitute him a trespasser; but the notice to have this effect must be actual, not constructive notice—and the placing in the hands of his deputy, the writ superseding the former process, will not of itself, be such notice as the law requires."

We cannot very well distinguish between an *injunction* and a *supersedeas*, as to the manner of affecting a party with notice of them. In respect to the former, it has been said that it is not necessary to constitute a breach, that the injunction should be actually served. If a party have, by himself or his attorney, notice in any other way, of the fact of an injunction having been granted, though it should not be regular notice, it is a breach of the injunction to disobey it. [Drewry on Inj. 399.]

Here a *supersedeas* in due form, as we must presume, was handed by the defendant in the executions to the constable. This we think was sufficient to inform him that further action upon them had been arrested, and in disobeying the *supertedeas* he subjected himself to the consequences resulting therefrom. If it is not genuine or authoritative it devolves upon him to show it. Notices, either initlatory, or issuing in the progress of a cause, were not, in practice, served by a sheriff, until the passage of the act which confers such power; and when such notices were served by him, he verified by oath, as any other individual is required to do, the fact of service. The statute in relation to notices, is perhaps considered as merely cumulative, and does not take from private persons the authority to serve them—it certainly is not exclusive as it respects a *supersedeas*. If the *supersedeas* had been handed to the constable by one of the by-standers, according to the view we have taken, the service would have been good, and being delivered by the defendant in their presence, and the delivery verified by their testimony at the trial of this cause, we think it quite sufficient to bring home to the constable notice of the *supersedeas*, previous to the sale. The ruling of the circuit court is consequently erroneous—its judgment is reversed, and the cause remanded.

ROWLAND, ET AL. V. LOGAN.

1. The mere circumstance that one loaning money takes a note payable to a married woman in trust for himself, will not give jurisdiction to a court of equity of a suit by his executor against the debtor and the husband and wife—there being no allegation in the bill that husband or wife interpose any impediments to a recovery at law by suit in their name.

Writ of Error to the Court of Chancery for the thirty-ninth district.

THIS bill is filed by Logan as the executor of T. A. Powell, (who died in Georgia, and there the letters testamentary were granted,) against Rowland and one Hague and his wife Mildred. The case made by it is this:

On the 26th Dec'r, 1840, Powell loaned Rowland \$2500, for which the latter executed his note to Mildred Hague, who then was the wife of John Hague. The note was delivered to Mrs. Hague in trust for Powell, was his property, and so acknowledged and received by Mrs. Hague. It was afterwards delivered to Powell by Mrs. Hague, and was in his possession at his death, which took place in 1842, he being then a resident in the State of Georgia. Rowland, under various pretences, declines to pay the sum due by the note to the complainant. The prayer is that Rowland may be decreed to pay the complainant, and that Hague and wife may be enjoined from asserting any further claim, &c.

Rowland, by his answer, admits the execution of the note to Mrs. Hague in October, 1840, for \$2500, for so much money received of her by him for safe keeping. When he received it he thought it was hers, and that it was to be put at interest for her, as her husband was poor, imbecile, &c. and unable as well as unfit to manage for her. That if the money was not hers, it was put in his hands to defraud the creditors of Thomas Powell or of Richard Powell, the latter of whom was greatly in debt and probably insolvent. That he understood at the time, the money was to be put at interest

for Mrs. Hague's benefit, she then residing with him. He remained under this impression until a short time before Powell's death, when he was informed by letter from Powell that the note had been transferred or delivered to him, and also requested to answer if he was ready or willing to pay it. He afterwards saw Powell and paid him \$1520, and took his receipt. This sum was paid in a settlement of matters between them. Powell then said he had not the note with him, but had left it at Rowland's house with Mrs. Hague. This receipt was kept by Rowland until after the death of Powell, when he was called on by the complainant to pay the note. He showed the receipt, and proposed to pay the balance after deducting the amount which the complainant refused to accept, though he admitted the receipt was good, and asked the privilege to take a copy. Since then, Rowland has never seen the receipt, though he has seen the paper which the complainant calls a copy, but which is untrue in the date, that being after the date of Powell's letter to him, and not before, as the pretended copy purports. He submits that he is willing to pay the balance to the person properly entitled to receive it, but demurs to the bill for several reasons, amongst which may be stated—

1. That if the facts be truly stated, the complainant has adequate relief at law.

2. Because there is no charge that Jesse or Mildred Hague assert a claim to the note.

3. Because the bill does not negative the fact of an administration in Alabama. The answer of Mrs. Hague admits the facts substantially as charged in the bill, and a decree *pro confesso* is taken as to her husband.

The evidence in the cause principally consists, on the part of the defendant, in an attempt to prove the payment asserted by his answer, and is the testimony of one witness, who says he heard a conversation between Powell and Rowland in the fall of 1842, a short time before the death of Powell, at the house of Rowland in Alabama, in which the former asserted, and the latter admitted, the payment of \$1520 on the note in controversy, and that a receipt had been given because the note was not present to be credited. The proof on the part of the complainant was the testimony of Mrs. Hague sustain-

ing the facts of the bill—a letter of Rowland under date of 19th May, 1842, admitting the debt—the testimony of several witnesses showing the extreme improbability that Powell was ever in Alabama after May, 1842, being afflicted with disease, and having died in August of that year—and Mrs. Hague's testimony that she was living in the family of Rowland until after the death of Powell, her brother, and that he was not there after March, 1842.

The chancellor overruled the demurrer—decreed that Rowland should pay the money—and that Hague and wife should assert no title, &c.

This decree is assigned as error.

RICE, for the plaintiff in error, insisted—

1. That the plaintiff's remedy was clear at law by suing on the note in the name of Hague and wife. The circumstance that it was knowingly given to a *feme covert* in trust furnishes no ground for jurisdiction. [Pond v. Lockwood, 8 Ala. Rep. 676; Porter v. Spencer, 2 Johns. Ch. 171; Standifer v. McWhorter, 1 Stewt. 532; Halstead v. Rabb, 8 Por. 63; Hitchcock v. Lukens, 8 Por. 333; Grigsby v. Nance, 3 Ala. Rep. 347; Booth v. Morris, 8 Ib. 907; Bird v. Daniel, 5 Ib. 302; Jones v. Stewart, Ib. 855; Weir v. Buford, 8 Ib. 134.]

2. Nothing is stated in the bill which ousts the court of law of jurisdiction. [Hardeman v. Simms, 3 Ala. Rep. 747; Sadler v. Robinson, 2 Stewt. 520.]

3. One witness speaking positively to the admission of payment, should outweigh any number whose testimony is negative.

PARSONS and CHILTON, contra, insisted—

1. That the proof shows the existence of an express trust, and therefore it is a subject of equity jurisdiction. [2 Sto. Eq. 307; Comyn's Dig. Chan. 2, A; May v. Nabors, 6 Ala. Rep. 24.]

2. But the remedy of the plaintiff did not exist at law; he could not sue in the name of the *feme covert*, and cannot be required to use that of the husband. He might control the

suit, or his circumstances might affect it. [1 Story's Eq. 440.]

3. But even if the equity be defectively stated in the bill, the answers admit it, and disclose—1. That an account should be taken in the matters asserted to be settled between the defendant and Powell—2. That a discovery is necessary, and the evidence of Mrs. Hague essential to a recovery, and this could not be obtained at law, as she would be a party—3. That the defendant, Rowland, repudiates the trust created for Powell, and asserts title in Hague. [Elliot v. Boaz, 9 Ala. Rep. 772; Maury v. Lewis, 10 Yerg. 115; Rose v. Mynatt, 7 Yerg. 30; McLaughlin v. Daniel, 8 Dana, 184.]

4. When the remedy at law is doubtful or obscure, equity will take jurisdiction. [Weymouth v. Boyer, 1 Vesey, 416; Am. Ins. Co. v. Fisk, 2 Paige, 509; Teague v. Russel, 2 Stewt. 420.] So also when the remedy is defective. [Seymore v. Delancy, 3 Cowen, 445; Kendrick v. Dullum, 1 Tenn. 489; Drew v. Clark, Cook, 334; Lathrop v. Bennett, Kirby, 185.] The remedy at law must be plain, as well as adequate to oust a court of equity. [1 Kent, 207, 317, 499, 467, 364; Andrews v. Solomon, 1 Peters' C. C. 356; 5 Conn. 86; Walls v. Humm, 4 Litt. 267; Pitkin v. Pitkin, 7 Conn. 315; 1 S. & P. 138; 2 Caine's Ca. 1; 4 Johns. Cas. 287; 2 Swanst. 63.]

5. The bill may also be sustained on the ground to prevent multiplicity of suits, and to settle the rights between all the parties. [Story's Com. § 457; Mitford, 119; 6 Ves. 688; 4 Madd. 374; 2 Ala. Rep. 609; 3 Mum. 570; 3 Johns. 566.]

6. So also on the ground that the discovery is made by the answer of facts on which the complainant's relief depends. [Pryor v. Adams, 1 Call, 382; Avery v. Holland, 2 Tenn. 77; Duval v. Ross, 2 Mumf. 290; Bass v. Bass, 4 H. & M. 478; Emerson v. Slater, 3 Mon. 117; Rees v. Parish, 1 McCord Ch. 89.]

7. On the merits the case stands without aid, as the defence is not established, but on the contrary is disproven.

GOLDTHWAITE, J.—This cause, on the question of jurisdiction, seems quite clear against the complainant. The

mere circumstance that a trust has been created, does not invest courts of equity with jurisdiction over suits in relation to the trust property. It is only when the dispute is with reference to the administration of the trust as between the *cestui que trust* and trustee, or those in collusion with him, that the courts of law are evoked. [9 Ala. Rep. 351.] It is not asserted or pretended by the will that either Mrs. or Mr. Hague interpose any impediment in the use, by the *cestui que trust*, of their names, in a suit at law, and if there was a refusal on their part, it admits of doubt whether even a court of law would not protect the beneficial interest of the complainant; but without intending now to consider this point, we think it clear a suit at law could have been maintained either in the name of Hague alone or with his wife, for the recovery of the money, and that entirely independent of the endorsement by Mrs. Hague, and on the supposition that no interest passed by it. [Arnold v. Revault, 1 B. & B. 443; 4 Term, 616; Chitty on Bills, 26.] These authorities are satisfactory to the point, that there was neither doubt or difficulty in sustaining an action at law on the note, in the name of the husband alone, or joining with his wife; and it is not clear but that the complainant might have sued in his own name, either on the indorsement of Mrs. Hague or in connexion with the subsequent promise. Thus, in Carter v. Davis, 1 Campbell, 485, a suit by the *indorsee* of a married woman was maintained on the ground that the defendant was estopped by his promise to pay the indorsee from contesting the authority of the wife to make the indorsement. And in Proutwick v. Marshall, 4 C. & P. 495, the indorsement of a bill by a *feme covert* in her own name, was held to pass the legal interest, her husband's assent being shown. Whether the assent of the husband to the indorsement by his wife, under the circumstances of the case, might not be fairly inferred, especially after the maker's promise to pay the assignee, is a matter which we need not decide.

Taking the case either as alleged by the bill, or made out in proof, we think it is not one in which the complainant is

remediless at law, or that such difficulty or doubt exists in the legal remedy as to warrant the interposition of chancery, on either of these grounds. As this conclusion disposes of the case, we need not express an opinion on the proofs.

Decree reversed, and here rendered dismissing the bill without prejudice.

BUTLER v. BUTLER.

1. When the residence of a non-resident is known, a copy of the order posted up at the court house door, must be enclosed to him, otherwise no decree *pro confesso* can be rendered.
2. One in contempt, cannot raise the objection that a sufficient time did not elapse between the report of the master and its confirmation.
3. In the case of a non-resident, a decree *pro confesso* is an admission of the truth of the allegations of the bill.
4. The failure to execute the bond, which the law requires, when a decree is rendered against a non-resident, is error.
5. A bill may be exhibited in the county where a defendant resides, though that is not the county in which the judgment sought to be enjoined was rendered.

Error to the Chancery Court of Dallas.

THE bill was filed by W. J. Butler, the defendant in error, against James A. Butler, the plaintiff in error, a resident of the State of Mississippi, and one Randal Duckworth, a resident of Dallas county, to enjoin the further prosecution of a suit, commenced by the latter against the defendant in error, in the county court of Lowndes, on a promissory note, which the bill alledges was the property of J. A. Butler, and praying also the allowance of an account against him, he being alledged to be insolvent. An injunction was awarded. Process

of subpoena was issued, and returned executed upon Duckworth, and upon affidavit made before the register, that J. A. Butler was above the age of twenty-one, and resided near Columbus, in the State of Mississippi, an order was entered, that he answer the bill within seventy days, or that it would be taken as confessed against him.

At the succeeding term of the chancery court, a decree *pro confesso* was rendered against both defendants, the order reciting that it appeared to the satisfaction of the court, that the order had been published in the Dallas Gazette, once a week for four weeks consecutively, and a copy of the same posted on the door of the court house in Dallas county. The court then proceeded to render a decree perpetually enjoining the further prosecution of the suit, and made a reference to the master to state an account between the complainant and J. A. Butler. The register reported that there was due from him to the complainant, \$583 03, after discharging the note in suit, for which sum a decree was rendered against him in favor of complainant. From this decree he prosecutes this writ, and assigns for error—

1. There was no such proof of publication as the law requires to authorize a decree *pro confesso*.

2. There was no copy of the bill sent to the non-resident defendant, though his place of residence was known.

3. The report of the register was confirmed on the same day it was made.

4. A decree is rendered against a non-resident without proof.

5. No such bond has been given as the law requires, to justify a decree against a non-resident.

6. The chancery court of Dallas county had no jurisdiction to enjoin a judgment in Lowndes county.

A. GRAHAM, of Perry, for plaintiff in error, cited, *Erwin v. Ferguson*, 5 Ala. R. 158; *Batre v. Auze's Heirs*, *Ib.* 173; *Chancery Rules*, 40, *Clay's Dig.* 616; *Clay's Dig.* 355, § 65; *Wilkins and Hall v. Wilkins*, 4 Porter, 245; *Clay's Dig.* 353, § 45; *Walker v. Mobile Bank*, 6 Ala. 452; *Shrader v. Walker*, 8 Ala. 244; *Story's Eq. Pl.* 487-8-9.

The complainants insist, that the case should not only be reversed, but the bill dismissed for want of jurisdiction.

BOLING, contra.

1. The authorities cited by the plaintiff in error, do not sustain the first assignment.

2. The 40th rule regulating chancery practice, does not require a copy of the bill to be sent to the non-resident.

3. The record does not show that the report of the register was confirmed the same day it was made, or within two days; but if it does, that is not error. Both the defendants being in default and in contempt, are not entitled to notice, and could not have been heard if they had received notice. [Massena v. Bartlett, 8 Porter's Rep. 277, and authorities there cited.] The exceptions to the report come too late here. [Minor, 35.]

4. After due publication, &c. as to a non-resident, if he fail to appear and answer, the allegations of the bill are taken as true, without further proof, the same as though he had been a resident and had personal service. [Arnold v. Shepard, 6 Ala. R. 299.]

5. If there be error in this point, (as to the giving of the bond,) this court will not remand the cause, but will reverse and here render the proper decree, or will merely reverse as to this point, and remand the cause that a bond may be given, (Reed v. Brashers, 3 Porter's Rep. 378; Oliver, Adm'r, v. Hearne & Whitman, 4 Ala. Rep. 271,) at the cost of the plaintiff in error.

6. If a bill enjoining a judgment be filed in the county of the residence of the plaintiff in the judgment, (defendant in the chancery suit,) it is good. [Clay's Dig. 344, § 2; 348, § 11; Eldridge v. Turner, at this term; Shrader v. Walker, Adm'r, et al. 8 Ala. R. 244; 1 J. J. Marsh. 256.] If filed in the county of the judgment it is good. [1 Dana's Rep. 109.]

8. This bill being to enjoin a suit pending, the case in Dana does not apply, and if it does, the objections to the jurisdiction come too late here. [Farley v. Farley, 1 McCord Ch. 513; McDonald v. Crockett, 2 Id. 135; Byle v. Fitzhugh; 2 Wash. 213; Barne's v. Lee, 1 Bibb, 527; 2 Sum-

mer, 546.] The decisions in *Dana* and 4 J. J. Marsh. are founded on a Kentucky statute, peculiar to that State. See these cases in connection with the statute, to be found in 2 Kentucky Statutes, 810; *Id.* note c. 2; 1 *Id.* 490, note 17; *Brackenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 256.]

ORMOND, J.—The first and second assignments of error relate to the same matter, and will be considered together. In the case of a non-resident defendant, publication in the mode pointed out by the statute, in a newspaper within the State, and also posted up at the court house door, is equivalent to an actual service of subpœna. In addition, the 40th rule of chancery practice requires, that when the residence of the defendant is stated, either in the bill or the affidavit to obtain the order of publication, the register shall enclose to him by mail, within forty days from the time of making the order, a copy of the order posted up at the court house. It does not appear from the recital of the facts stated by the chancellor upon rendering his decree, that this has been done, and without this, there was no authority for the rendition of the decree *pro confesso*, as it appears, both in the bill and in the affidavit, that the defendant resided near Columbus, in the State of Mississippi. The rules for the government of the practice in the chancery courts, are made by virtue of authority given to the courts of chancery by statute, (Clay's Dig. 354, § 49,) with the approbation of this court, and these rules, when made, must have the force of law. In many instances, where there has been an omission, or failure to comply, a presumption of waiver may arise from a failure to make the objection in the court below. But that does not apply here, as there has never been an appearance, and consequently there can be no waiver.

The objection that it does not appear that two days elapsed between the report of the master and its confirmation, cannot avail the present defendant. Being in contempt, he was not entitled to notice, or to appear before the master without a special order from the chancellor, and could not be prejudiced by the matter complained of. [*Mussina v. Bartlett*, 8 Porter, 277.]

The case of *Arnold v. Sheppard*, 6 Ala. R. 290, is in point,

that where the relief is sought against an absent defendant, after due publication, the bill may be taken as true, without further proof. Such is the case here, the entire relief is sought against J. A. Butler, the non-resident defendant, the decree *pro confesso* was therefore an admission of the truth of the allegations of the bill.

The omission to execute the bond which the statute requires, previous to obtaining a decree against a non-resident defendant is a fatal error. [Erwin v. Ferguson, 5 Ala. Rep. 165; Clay's Dig. 353, § 45.] Nor is this as supposed, a matter which may be cured by an amendment in the court below.

The objection to the jurisdiction, because the bill was not exhibited in the proper county, cannot prevail. Waiving the consideration of the question, whether the objection can be taken by one in contempt, who has never appeared, or answered the bill, we are clear in the opinion that the bill was properly filed in the county where the defendant resided, and by whom the suit in Lowndes county was instituted. The decision in Shrader v. Walker, 8 Ala. Rep. 244, did not intend to affirm that the suit must be brought in the county where the suit sought to be enjoined was pending, when that was not the residence of the defendant in chancery instituting such suit. [See Eldridge v. Turner, and Freeman v. McBroom, et als. at the present term.]

Whether in such a case a decree could be rendered against a non-resident for the excess of the demand of the complainant, after extinguishing that of the defendant, is a question not raised by the assignment of error.

Let the decree be reversed and the cause remanded.

CARTER v. PICKARD.

1. Where it appears from the papers sent up by a justice of the peace to the circuit court, that three judgments had been rendered by him against a garnishee, and the condition of the appeal bond recites that an appeal was taken in "the three different cases," but the transcript of the justice contains the papers in but one only, it cannot be intended that all the cases were consolidated by the justice.
2. An appeal from a justice of the peace should not be quashed for a defect in the bond, unless the appellant, upon being required by the court, fails or refuses to execute a perfect one.
3. Where the record does not state at whose instance an appeal was quashed, it must be intended that the motion for that purpose was made at the instance of the appellee, who was involuntarily brought before the court.
4. Wherever the court acts against a party without his consent given, or to be implied, the legal inference is, that the act was *in invitum*, and no bill of exceptions is necessary in such case, where the judgment shows the error.

Writ of Error to the Circuit Court of Tallapoosa.

W. W. MORRIS, for the plaintiff in error, insisted, that it must be intended that the appeal was quashed at the instance of the appellee. As for the proceeding before the justice, it was clearly erroneous in permitting the garnishee's answer to be contested, and in rendering a judgment against him for costs. [Clay's Dig. 260, § 6.] The demand litigated exceeded fifty dollars; consequently the justice had no jurisdiction of it—and the circuit court should not have awarded a *procedendo*.

S. F. RICE, for the defendant in error. There was no exception taken to the judgment quashing the appeal, and it cannot therefore be revised. [9 Porter's Rep. 136.] Besides it does not appear upon whose motion the court acted, and it cannot be intended, that it was at the appellee's. In fact, in

the state of the record, it must be presumed that the judgment was assented to. [9 Ala. Rep. 768.]

The appeal bond is fatally defective—it embraces three cases, and does not show to what court they were returnable. If the appellant had offered to perfect the bond, and the court had refused to allow it, then there would have been error; but as no such offer was made, his acquiescence must be presumed. [9 Porter's Rep. 195.]

COLLIER, C. J.—The plaintiff in error was summoned as a garnishee at the suit of the defendant, to appear before a justice of the peace of Tallapoosa, and answer whether, and how much he was indebted to John Canon, against whom the defendant had recovered a judgment before the justice. It appears from a paper in the transcript, that the garnishee was indebted to the defendant in the judgment in a sum exceeding fifty dollars, and the justice condemned the same to the satisfaction of two judgments *in toto*, and a third in part, which the plaintiff below recovered against Canon before him. The garnishee prayed an appeal, and executed a bond for its prosecution, in which it recited that a judgment was rendered against him in three cases, &c.

The judgment of the circuit court recites, that the parties came “by their attorneys, and on motion the appeal is quashed by the court:” thereupon a *procedendo* was awarded to the justice, and a judgment rendered against the garnishee and his surety in the appeal bond for costs.

Although the condition of the bond recites that an appeal was taken in “the three different cases,” and provides for their successful prosecution, &c., yet it cannot be inferred that they had been consolidated by the justice, even if it had been competent for him to do so. In fact such an idea is negatived by the papers returned to the circuit court, which indicate that several judgments were rendered. The transcript in the case before us, contains only the papers and proceedings in one case, and the question is, whether in this condition of the record, the appeal was rightly quashed.

In Lowry v. Stowe, 7 Porter's Rep. 486, it was decided, that the proceedings in a cause commenced by attachment should not be quashed for a defect in the bond, unless the plaintiff, upon the requisition of the court, refused to perfect it by the substitution of a new bond. [See also, Alford v. Johnson, 9 Id. 320.] We think the same rule must be applied in appeals from justices of the peace, and that they should not be dismissed or quashed for a defect in the bond unless the appellant, upon being required by the court, fails or refuses to execute a perfect one.

True, the record does not state at whose instance the appeal was quashed, but the only reasonable intendment is, that the motion for that purpose was made at the instance of the appellee, who was involuntarily brought before the court. It is difficult to perceive upon what ground the appellant could have moved a dismissal of the appeal—he would not be heard to alledge the defectiveness of the bond; for he should have executed it in the form prescribed by the statute, and could not alledge his own omission as a ground for repudiating the cause.

The error of the court is sufficiently apparent, and no bill of exceptions is necessary to show that the action of the circuit court was without, and in point of law against the appellant's consent. Wherever the court acts against a party without his consent given, or to be implied, the legal inference is, that as it respects such party, the act is *in invitum*. If the bond does not conform to the statute, no judgment could be entered against the surety for costs; whether this is a clerical misprision, and amendable, we need not inquire, as, for the error already noticed, the judgment must be reversed, and the cause remanded.

SHREEVE & KNAPP v. THE STATE.

1. Under our statute the deputy sheriff, when he arrests a party on a *capias*, for a misdemeanor, is authorized to take his recognizance, and such recognizance need not be certified by the officer.
2. The misdescription, or the want of a proper description of the offence in the recognizance, will not avoid a judgment on it, as it is forfeited by the non-appearance of the party.
3. After judgment, it is too late to object that there is a variance in the recognizance entered into, and that set out in the judgment *nisi* and *sci. fa.*

Writ of Error to the Circuit Court of Mobile.

Sci. fa. on a recognizance. The judgment is one of *nil dicit*, after the return of two *nihils* against Knapp, and after personal service on Shreeve. The judgment *nisi* recites that on the 29th of April, 1843, the defendant Shreeve, and A. P. Knapp as his surety, entered into bond, &c. conditioned that Shreeve should make his appearance, &c. at, &c. to answer to the State of Alabama on a charge of *retailing*, and being called, came not; wherefore it was considered, &c. The indictment set out in the record is for retailing spirituous liquors in quantities less than one quart without license from the county court. The return of the *capias* is by one Watson, in the name of the principal sheriff, and states the arrest of the defendant, as well as that he entered into bond for his appearance, "which bond is herewith returned."

The recognizance is not made a part of the record, by being vouched, but appears in the transcript. It is in the usual form, and conditioned that Shreeve shall appear to answer the State in a charge *for retailing without license*. In the body of the recognizance the surety is called Austin P. Knapp, but signs himself A. P. Knapp, and is certified by one Watson as taken and acknowledged before him as deputy sheriff.

The defendants assign as error—

1. That the recognizance is taken and certified by a person not authorized by law to do so.
2. The *capias* confers no authority to take a recognizance in this form.
3. The name of Shreeve is not properly described in the judgment.

CHANDLER, for the plaintiffs in error.

ATTORNEY GENERAL, contra.

GOLDTHWAITE, J.—1. The penal code directs that when the offence for which the party is arrested is a misdemeanor, it shall be the duty of the sheriff to take his recognizance, with sufficient sureties, in such sum as the character of the prosecution may require; also that the officer taking the recognizance shall file the same with the clerk of the circuit court of the county in which the indictment was found, previous to the first day of the next term of the court. [Digest, 461, § 5, 6.] The duty thus imposed is not confined to the sheriff in person, but, in common with other official acts, may be performed by a deputy. The act does not require the officer to make a certificate on the recognizance, and one being found in the files of the cause, necessarily connects itself with the return of the sheriff to the *capias*. We think there is nothing available to the defendants in the fact that the recognizance is certified by the deputy sheriff.

2. It is urged however that the *capias* directs the sheriff to arrest the party to answer a charge for *retailing liquors* without a license, and therefore there was no authority to take a recognizance conditioned that the party should appear and answer a charge for *retailing* without a license, or for *retailing* generally. This is but another form of stating the objection that the offence is not technically described in the recognizance, but we have several times held that such a description was not essential. [Hall v. The State, 9 Ala. Rep. 827; Browder v. The State, Ib. 58.] At common law, it was not considered essential, even in a warrant, to state the

charge with technical precision, (Chitty's C. L. 33); and it is evident great mischiefs would arise if prosecutions could be defeated either for the want of a proper description, or even a misdescription of the offence in the recognizance. Every recognizance, when drawn in a correct form, contains three distinct conditions: 1. To appear—2. To answer a particular offence; and 3. Not to depart without the leave of the court. Now it is evident, if the stipulation is to appear at the court without reference to the offence, that a breach may be assigned for the non-appearance, though in practice it is supposed no court would permit the estreating of a recognizance, unless there was some charge preferred against the accused, and he was called to answer. In our judgment the sheriff had the authority to take the recognizance in this case in its present form, and although it does not technically describe the offence of retailing spirituous liquors, yet this is a defect of which the defendant cannot claim any advantage.

3. It is supposed also there is a variance between the recognizance as described in the judgment *nisi* and that which appears in the record, inasmuch as in the latter the charge is said to be *retailing*, whilst in the former it is *retailing without license*. Without stopping to inquire whether this is such a misdescription of the recognizance as would prevent it from being given in evidence on an issue of *nul tiel record*, we are clear we cannot notice it in the present condition of the record. If advantage had been claimed in the court below on this ground, it would have been competent to set aside, or perhaps to have amended the entry. It is too late after judgment to inquire whether the recognizance conforms to the judgment *nisi* or *sci. fa.*

We come to the conclusion there is no error in the judgment. Affirmed.

GOVERNOR, USE, &C. V. STONUM, ADM'R.

1. The statute forbidding an action to be brought against the sureties of a sheriff, or other public officer, after the lapse of six years, for a misfeasance, or malfeasance committed by him (Clay's Dig. 329, § 90,) commences to run, when the responsibility of the surety is conclusively ascertained.
2. In the case of the collection of money by the sheriff, by execution, the statute commences running in favor of the surety, when the sheriff returns the execution satisfied.

Error to the Circuit Court of Conecuh.

DEBT, for the use of the Branch Bank at Montgomery, by the plaintiff in error, against the defendant in error, one of the sureties of Jones Weatherford, sheriff of Conecuh county, on his official bond.

The breaches assigned upon the bond are, that several executions in favor of the Bank came to the hands of the said Weatherford, in the year 1834, and that he made the money thereon, which he failed to pay over during his life-time, and which, defendant, as administrator of the said Weatherford, failed to pay over, on demand made by the agent of the Bank on the 7th August, 1843.

The defendant pleaded, 1. *Nil debet*.

2. That the cause of action did not accrue within six years next before the suing out of the writ.

3. That the suit was not prosecuted within six years after the commission of the several acts, or causes of action complained of, if any such were committed, or existed.

4. That the acts of the sheriff complained of, were committed more than six years before the institution of the suit.

To these pleas the plaintiff demurred, which were by the court overruled, except as to the first plea.

Upon the trial before the jury, as appears from a bill of exceptions, it was proved, that Jones Weatherford was elected

sheriff of Conecuh, in 1834, and that the defendant, with others were his sureties on his official bond. That whilst sheriff, and after the execution of the bond, he received the execution described in the declaration, and made the return of satisfaction shown by the records of the court. That the sheriff died about the 1st of August, 1835, and the defendant administered on his estate, and that on the 7th August, 1843, the plaintiff, by its agent, demanded the money received by the sheriff, of the defendant, his administrator.

Upon these facts, the plaintiff moved the court to charge the jury, that the statute of limitations did not commence running until after the demand was proved to have been made. Also, that the action did not accrue till after the demand was proved to have been made. Further, that the time elapsing between the return of satisfaction by the sheriff, and the time when the demand was made, was not a sufficient length of time for the jury to infer, in the absence of testimony, that the money collected on the executions had been paid to the bank, which charges the court refused, and charged the jury, that they should ascertain the time at which the executions were returned satisfied, and then from that time allow the plaintiff a reasonable time within which to make a demand, and if, after the expiration of what they might consider a reasonable time, it was more than six years before suit was commenced, the plaintiff could not recover. To all which the plaintiff excepted.

The assignments of error are upon the judgment upon the demurrer, and the matters arising out of the bill of exceptions.

WATTS and ELMORE, for plaintiff in error.

1. The demurrer to the pleas should have been sustained. They should have averred some act of non-feasance or misfeasance, or other neglect, and the facts which constituted it, committed by the sheriff at some time, six years before the institution of this suit, in order to be a full answer to the averments of the declaration. [Blanchard on Lim. Law. Lib. 55.]

2. The sheriff is but an agent, so far as the collection and

payment of money is concerned, for the plaintiff in execution.

3. Before suit can be maintained against an agent, there must be a demand and refusal, or a conversion established in some other way. [McBroom v. Governor, 6 Por. 32; Mardis' Adm'r v. Shackelford, 4 Ala. Rep. 493; Pratt and Stewart v. Frazier, 5 Ala. 114; Sally's Adm'r v. Capps, 1 Ib. 122; Tillottson v. McCrillis, 11 Vt. R. 477; Topham v. Braddick, 1 Taunton, 571, t. p.; Houston v. Frazier, 8 Ala. Rep. 82, 86.]

4. Before suit could be maintained on a sheriff's bond, as in this suit, it was necessary to make a demand of the sheriff or his representatives, or show a conversion in some other way. The right of action did not accrue until then. [McBroom v. The Gov. *supra*; Robbins v. Gov. 7 Ala. 79; Clay's Dig. 217-18; Wilder v. Bailey, 3 Mass. 289; Hutchinson v. Parkhurst, 1 Aik. Vt. Rep. 258; 1 N. & M. (S. C.) 214; Wright v. Hamilton, 2 Bailey, 51; Dumas & Co. v. Patterson, et al. 9 Ala. 484.]

4. The statute of limitations does not commence running until the right of action accrues. [Neal v. Cunningham, 2 Porter, 171; Chitty on Bills, 609-10, and notes 1 and 2; Thorington v. Lucas, 7 Ala. 605, Odlin v. Greenleaf, 3 N. H. Rep. 270; Jones v. Conway, 4 Yeates, 109; Blanchard on Lim. 54.]

5. It is only from the commission of the act complained of, in this suit, that the right of action accrued. The act complained of, is the failure to pay the money collected when the demand was made by plaintiff. [Townsend & Gordon v. Everett, 4 Ala. 611; Robbins v. Gov. *supra*; Wright v. Hamilton, 2 Bailey, 51.]

6. Whenever a demand must be made before the suit can be maintained, the statute of limitations does not commence running until the demand is made. [Chitty on Bills, 609-10, and notes 1, 2; 2 Taunt. 322; Wright v. Hamilton, 2 Bailey, 51; Pickett, Adm'r v. Curtis, Adm'r, 1 Sumner, 478; 21 Eng. Com. Law, 468; 2 Bibb, 610; 13 Wend. 267; Little v. Blunt, 9 Pick. 488; Law Lib. Blanchard on Lim. 55-6; Staniford v. Tuttle, 4 Vt. 82; 4 Bac. Ab. title Lim. 474-5.]

7. The liability of a surety to suit is coeval with that of his principal, and no right of action could accrue as the surety, before it accrued against the sheriff, his principal.

8. Mere passiveness on the part of the plaintiff could not produce a discharge of the surety. [McBroom v. Governor, 6 Porter, 32.]

9. Nine or ten years is not sufficient length of time to constitute staleness independent of the statute of limitations. [21 Eng. Com. Law. 468; Holmes v. Herrison, 2 Taunton, 323; Law Lib. Blanchard on Lim. 54, 55; 16 Johns. 40; Cottle v. Payne, 3 Day, 289; Mattocks v. Bellamy, 8 Vt. Rep. 470.]

10. A party cannot rely on staleness unless he pleads payment. [Blanchard on Lim. *supra*.] In this suit the only plea is the statute of limitations. [Treasurer v. McPherson, 2 McMull. 69.]

PORTER, with whom was BELSER, for defendant in error.

1. The statute begins to run at the time when the right of action accrued, and the right of action accrues whenever the breach of duty occurs. [Howell v. Young, 5 Barn. & Cress. 529; Short v. McCarthy, 3 Barn. & Ald. 630; Bartley v. Faulkner, *Ib.* 288; Brown v. Howard, 4 Moore, 508; Granger v. George, 7 Dow. & Ry. 729; Miller v. Adams, 14 Mass. Rep. 456.]

2. A demand may be necessary to give damages as a penalty under our statutes, but is not necessary to give a right of action for a breach of duty. [Brewster v. Van Ness, 18 Johns. 133; Lillie v. Hoyt, 5 Hill's Rep. 395.]

3. In this case the death of the sheriff operated as a conversion of the funds collected. [Taylor v. Easterling, 1 Richardson, 314.] And when there has been a conversion, no demand is necessary. [The Gov. v. Robbins, 7 Ala. R. 81; Townsend v. Everett, 4 Ala. R. 610; Orr v. Duval, 1 *Ib.* 263; Jones v. Auld, 9 *Ib.* 462.]

4. Numerous cases are found sustaining the decision that the statute commences from the time of the collection of the money. [Coffin v. Coffin, 7 Greenl. 298; Stafford v. Richardson, 15 Wend. 302; Buckner v. Putt, Litt. Sel. Cases, 234.]

ORMOND, J.—The question to be decided in this case grows out of an act of the legislature, passed in 1832. “No action; suit, or motion, shall be maintained against the security, or securities of any sheriff, constable, or other public officer of this State, for any misfeasance, malfeasance, or other cause whatever, hereafter committed, unless the same be commenced or prosecuted, within six years, next after the commission of the act complained of.” [Clay’s Dig. 329, § 90.] The sheriff having collected certain monies under executions in favor of the Branch Bank at Montgomery, returned them satisfied, and shortly afterwards died, and no demand was made of his administrator, until about nine years after the return—and the point to be determined is, when did the statute commence running in favor of the sureties.

That this is one of the acts, or omissions of duty, which it was the design of the legislature to provide against, can admit of no doubt. It is indeed the prominent, and chief responsibility of the sureties of a sheriff, vastly exceeding all other misfeasances, and nonfeasances together, and such a construction must be put upon the act, as will effectuate its manifest design. If the statute does not commence running until after a demand is made of the sheriff, then in such a case as this, the act will not bar a suit against the sureties until fifteen years after the return of the sheriff, had conclusively ascertained their responsibility for the money collected by him. Such a result would render the statute wholly inoperative, as it is clear that it was intended the sureties should not continue responsible for the acts of their principal, longer than six years.

The key to the statute then is, the responsibility of the sureties for his acts; when that commences, the statute begins to run. To cover all possible cases, the legislature employed the most general terms, “misfeasance, malfeasance, or other cause whatsoever,” and in our judgment this language embraces the case of the retention of money by the sheriff, after its collection.

The most formidable argument urged by the plaintiff in error is, the doctrine settled by this court, in several cases, and referred to in his brief, that the sheriff is not liable to an action, until a demand is made of him; or some act of his is

shown, equivalent to a conversion of the money to his own use. *McBroom v. The Governor*, 6 Porter, 32, and the *Governor v. Robbins*, 7 Ala. R. 80, are instances of this kind. These, and other decisions of this court, are made in reference to our statutes, giving a penalty if the money is not paid over on demand; or else were actions on the sheriff's bond, where it was necessary to fix a default on the sheriff, in order to charge his sureties: but in all these cases, it is admitted, that a conversion by the sheriff will render a demand unnecessary. If this action was against the sheriff, unless he proved that he kept the money ready to pay over on demand, the inference from such a long detention would be irresistible, that he had converted it to his own use.

Although the sheriff may not be liable to any of our statutory penalties, or the plaintiff be entitled to the summary remedies afforded him, until he makes a demand of the money, yet it is equally certain, it is the duty of the sheriff to pay over the money, and to give information if in his power, that he has the money ready to be paid over; and if he holds it an unreasonable time, without any effort to give notice to the plaintiff, it would be such neglect as would be evidence of an intent to convert the money to his own use, as in the case of any other agent. [*Lillie v. Hoyt*, 5 Hill, 395.]

So also, the death of the sheriff, which happened soon after the money was collected, must of necessity have caused a conversion of the money, as his representative could have no means of distinguishing the money of the plaintiff from that of his intestate. [*Taylor v. Easterling*, 1 Richardson Rep. 314.] What is said in the case of the *Gov. v. Robbins*, *supra*, and in *Dumas v. Patterson*, 9 Ala. 486, that the fact that the sheriff did not retain the identical money which he had received in each case, was not evidence of a conversion, must be understood in reference to that particular state of facts, and amounts to no more than is there stated—that the mere omission to keep each parcel of money received by him separate from all others, would not be evidence of a conversion. This however ceases with the necessity of the case, and after a considerable lapse of time, the inference is the other way, that the money so received has been mixed

with the proper monies of the sheriff, and used, and employed by him as his own. We have said this much, in reference to the decisions referred to, that their force may not be weakened by any casual expression dropt here.

Our decision here, is based upon what we consider the true and proper exposition of this statute—that when the responsibility of the surety is conclusively ascertained, then the statute commences running in his favor. Any other construction of the statute would make it perfectly 'illusory, as he has no means of ascertaining whether the money has been paid over or not, and cannot therefore protect himself by insisting on a suit being brought, or by discharging it himself and resorting to his principal.

This view renders it unnecessary to scan the charge of the court, to ascertain whether it is critically correct as the court would have been authorized in going farther than it did, in its charge to the jury.

Let the judgment be affirmed.

BELL v. KILLCREASE.

1. It is no objection to a complaint for a forcible entry and detainer, that it is unnecessarily prolix in describing the premises sought to be recovered; if it furnishes *data* from which a diagram of the *locus in quo* may be drawn, its locality and bounds ascertained, it is sufficient.
2. Where the transcript of the proceedings before the justice in a case of forcible entry and detainer, shows that the defendant pleaded *not guilty*, that a jury was summoned and impaneled, who found a verdict against him on which judgment was rendered, the defendant cannot in an appellate court object to the want of, or to defects in the *summons* or *venire* which the statute required the justice to issue.
3. The record or proceedings are returned, or at least considered as returned in answer to a *certiorari* issued by a superior to an inferior tribunal, although the return itself states that a copy only had been sent up; and under our statute where the justice trying a forcible entry and detainer sends

up the original papers, with a transcript of the proceedings, all duly certified, the circuit court should require the appellant to assign errors without awarding an alias *certiorari* to bring up copies of the original papers.

Writ of Error to the Circuit Court of Baldwin.

THIS was a proceeding instituted by the defendant in error before a justice of the peace for a forcible entry and detainer. The complainant describes the lands of which the plaintiff was in possession, thus: "Beginning at a water oak on Tensaw lake—running from thence south 13 degrees east, forty-two chains; thence south 85 degrees 54 chains; thence north-westwardly across the Tensaw lake; thence up the margin of said lake, so far that a line therefrom south 22 degrees west to the margin of said lake; thence up the margin thereof to the place of beginning, including 640 acres of land, the said tract being the same granted by the United States to Francis Steel by patent bearing date 18th November, A. D. 1808." The land of which the forcible entry and detainer is charged, is thus described, viz: "a certain parcel of said tract of land, to wit, that portion described as lying across Tensaw lake, and bounded by said lake on all sides, except that which has a line running from the one margin of said lake south 22 degrees west, to the other margin thereof."

It is certified by the transcript sent up by the justice that the defendants appeared and pleaded "not guilty," the issue was submitted to a jury, who returned a verdict for the plaintiff, and judgment was thereon rendered. The cause was removed to the circuit court by *certiorari*, where the defendants below assigned for error—1. That the complaint did not authorize process to issue, and that there was neither process, *venire facias*, or a judgment of the justice—2. The premises sought to be recovered are not described in the complaint. Upon this assignment the judgment was affirmed.

In the circuit court, the plaintiff in the *certiorari* moved for a rule of the justice to show cause why he should not send up a perfect transcript in this case, and objected to assigning errors on the original papers which had been sent up

instead of the transcript. The court held that the original papers thus sent up were sufficient, and refused the rule compelling the plaintiff to assign errors on the original papers, or submit to a judgment of affirmance for want of an assignment. To all which they excepted, &c. and here assign for error the ruling of the circuit court.

J. W. PRYOR, for the plaintiff in error, insisted that the complainant did not identify the land which the defendants below were charged to have entered upon and detained; and that the rule upon the justice to send up a complete transcript of the original papers, should have been granted. [Clay's Dig. 253, § 16-18; 6 Port. Rep. 99; 1 Ala. Rep. 344-456; 3 Id. 744.]

P. PHILLIPS, for the defendant in error, cited Clay's Dig. 314, § 10; 252, § 10; 253, § 18; 7 Ala. Rep. 383; 4 Id. 114; 6 Id. 557; 1 Litt. Rep. 363; 3 J. J. Marsh. Rep. 396; 6 Munf. Rep. 394; 6 G. & J. Rep. 386.

COLLIER, C. J.—The complaint is unnecessarily special in the description of the land of which the complainant is in possession, but this is not a legal objection to it. It furnishes *data* from which it would not be difficult to draw a diagram and ascertain its locality. The quantity of land, name of the original patentee, length of the lines, courses, situation of the lake, and how and where it is traversed by the lines, and bounds the land, is distinctly stated. Having progressed thus far, the supposed difficulty of identifying the land all vanishes—it is only necessary to follow the line which we have supposed to be traced from “one margin of the lake, south 22 degrees to the other margin thereof”—remembering that the *locus in quo* is across the lake from the point at which the survey begins. The objection then, that the complaint is too general to support the judgment, or to enable the officer to execute a writ of *habere facias possessionem*, is not well taken. [2 Porter's Rep. 86; 8 Ala. Rep. 87; 3 Ala. Rep. 127, and cases there cited.]

The proceedings before the justice not only do not show that there was no objection to the process to bring in the de-

fendants and the *venire facias* by which the jury were summoned ; but it is explicitly stated in the transcript sent to the circuit court, that the plea of *not guilty* was interposed, the jury summoned and impannelled, and that they found a verdict of *guilty*, on which judgment was rendered. In this condition of the cause it was not allowable to object after judgment to these proceedings, which were but preliminary to the trial : if they were defective, all objection was waived by pleading to issue, and submitting the case to a jury. [4 Ala. Rep. 114 ; Clay's Dig. 252, § 10.]

It is provided by the act of 1805, that if the jury in a proceeding for a forcible entry and detainer, shall find the defendant guilty, it shall be the duty of the justice to record the verdict, and give judgment thereon with costs ; and also issue a writ of restitution, &c. It is also made the duty of the justice to enter on his minutes or docket, true copies of the complaint, the summons and *venire*, and their respective returns—the names of the jurors, their verdict and his judgment thereon—the names of the witnesses, and the admission of evidence objected to, and the rejection of evidence offered, the reason of such admission or rejection, and all the proceedings had before him touching the said complaint. *Further*, the proceedings had by virtue of this act, may be removed before the circuit court of the county in which the same may have taken place : “ and such removal shall be by writ of *certiorari*, and in no other way, and then only after judgment.” [Clay's Dig. 252, § 13 ; 253, § 16-18.]

A *certiorari* is a writ directed to the judges of an inferior court, or a justice of the peace, commanding them to certify a record or proceedings before them. The record itself is returned, or at least is considered as having been transmitted to the court above, even though the return state that a copy only had been sent up, and the court proceeds with the cause. [1 Dunlap's Prac. 220-223.]

There is nothing in our statutes, which, *in totidem verbis*, requires the justice to certify copies of the complaint, process and *venire*, instead of the original papers. True, he is directed to enter them “ on his minutes or docket ;” but this was doubtless intended as a mean of preserving a memorial of them more convenient for reference—less liable to loss, and

perhaps for the additional purpose of having a perfect transcript of all the proceedings. If the justice has performed this duty, it cannot be very important that he should retain the original papers in his office ; if the circuit court when the cause is removed there, should direct a *venire facias de novo*, or award a *procedendo*, the transcript before him will serve as a basis for his action. We cannot then perceive any reason why the circuit court should not recognize the original papers with a transcript of the proceedings when duly certified as a sufficient return to the *certiorari*, and require the plaintiff to assign errors thereon ; or in default of such assignment, affirm the judgment of the justice. To award an *alias certiorari* in such case, unless the plaintiff could show that he would be prejudiced, if required to proceed without a copy of the papers, would only be productive of delay, and defeat the summary and expeditious remedy which the statute intended to afford. We cannot think the circuit court should have made the rule upon the justice which the plaintiff asked. This view is decisive of this cause, and the judgment is consequently affirmed.

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HINDMAN v. DILL & Co.

1. A deed reciting that the grantor is unable to pay all his debts, and conveying certain slaves to a trustee to pay a preferred creditor, at the expiration of two months from the date of the deed, and also providing the slaves shall remain with the trustee, is not void *per se*, because it also provides, that the residue remaining after paying the preferred debt shall be paid to the grantor.

Writ of Error to the Circuit Court of Barbour.

CLAIM of property interposed by Hindman to certain slaves

levied on by attachment against one Cross, at the suit of Dill & Co.

At the trial, the claimant made title to the slaves in controversy under a deed executed by Cross, the 6th of February, 1846, conveying them to him in trust for the payment of a debt to Sarah and Nancy J. Smith, for \$700, providing that if the said debt was not paid in two months from the date, the said trustee should sell the said slaves, and apply the proceeds to the payment of said debt, and the balance, if any, to pay to the grantor. The deed also recites that the grantor is indebted greatly beyond his means to pay all his debts, and this is stated as the reason for the preference. The deed contains a provision that the trustee shall have the possession of the slave in the interim, and it appears to have been duly recorded in the office of the clerk of the county court.

The court charged the jury that the deed was fraudulent and void on its face.

The claimant excepted, and this charge is now assigned as error.

J. E. BELSER, for the plaintiff in error, cited *Malone v. Hamilton*, Minor, 266; *Stevens v. Bell*, 6 Mass. 363; *Johnson v. Cunningham*, 1 Ala. Rep. 249; *Graham v. Lockhart*, 8 Ib. 9. The decision in *Goodrich v. Davis*, 6 Hill N. Y. 438, is not the law of this State. [See 9 Porter, 573; *Robinson v. Rapelye*, 2 Stew. 86.]

P. T. SAYRE, contra, insisted, the provision withdrawing the property from sale for two months made the deed void. The provision that the surplus of the sale should be returned to the grantor in a case like this avoids the deed. [*Goodrich v. Davis*, 6 Hill N. Y. 438.]

GOLDTHWAITE, J.—In view of the numerous decisions of this court on the subject of fraudulent conveyances, it is impossible to sustain the charge of the circuit court, that this deed is fraudulent upon its face. It may be conceded, the deed admits the grantor to be in failing circumstances, but

this of itself cannot destroy his legal right to prefer a creditor. [Robinson v. Rapelye, 2 Stew. 86; Ashurst v. Martin, 9 Porter, 173.] Nor is the reservation of what may remain after paying the preferred debt a trust for the debtor's *use*, within the meaning of those decisions which avoid the deed when such a use is reserved. It is rather the declaration in terms, of what would otherwise be the legal effect of the deed without a clause to that effect. [Johnson v. Cunningham, 1 Ala. Rep. 262; Elmes v. Sutherland, 7 Ala. Rep. 262; Dubose v. Dubose, Ib. 235; Pope v. Wilson, Ib. 690; Graham v. Lockhart, 8 Ib. 9.]

We have had our attention called to the recent decision of Goodrich v. Davis, 6 Hill, 438, in which it seems to be considered that a deed like this, in New York, is fraudulent *per se*. That conclusion was doubtless controlled by the statute law of that State, which declares a deed void if it reserves a trust for the *use* of the person making it. We are not prepared to say, that under the circumstances disclosed in that case, we should have considered the trust as one for the debtor's use, but however that may be, it is certain that here, without any particular statutory declaration, such a reservation of a personal use, or even of a right to lead the use, would avoid a deed assigning all the debtor's property. [Gazzam v. Poyntz, 4 Ala. R. 374.]

We think there is nothing on the face of this deed which authorizes a court to pronounce it void.

Judgment reversed and cause remanded.

ANDREWS AND HALL, ADM'RS, v. BURNS, ADM'R.

1. A mortgage, though not recorded, is good as between the parties, and therefore binding on the administrator of the mortgagor, unless

Andrews and Hall, adm'rs, v. Burns, adm'r.

some creditor of the mortgagor, without notice of the mortgage, has obtained a judgment, and acquired a lien on the mortgaged property.

Error to the Orphans' Court of Dallas.

RICHARD HALL was appointed administrator of the estate of William A. Hall, deceased, in October, 1844; and some time after obtained an order for the sale of the personal property, which sale was returned as made, on the 18th January, 1845. In May, 1846, he reported the estate insolvent, and the court so declared it. In July, 1846, Richard Hall died, and the plaintiffs in error became his administrators, and the defendant in error was appointed administrator *de bonis non* of the estate of W. A. Hall.

The plaintiffs in error having filed their account for a final settlement of their intestate, as administrator of W. A. Hall, the following items were contested: No. 30. The facts of which were, that W. A. Hall, being indebted to one Andrews, executed to him a mortgage on several slaves to secure its payment. The slaves included in the mortgage, together with others, were sold by R. Hall, the administrator, with the consent of the mortgagee, and produced more than sufficient to pay the mortgage debt, amounting to \$933 82, which the administrator paid over to the mortgagee. The mortgage had never been recorded, and the creditors objected to the allowance of this item as a payment of a preferred claim, upon the ground that as the mortgage had not been recorded, it was no *lien* upon the property, and the court sustained the objection and held that the mortgage created no *lien* upon the property.

The administrators also claimed an allowance of an item of \$57 95, under the following state of facts: R. Hall, as administrator of W. A. Hall, sent the cotton of the estate to a commission house in Mobile, which house made sale of the cotton, and transmitted him an account of sales, which is thus stated:

 Andrews and Hall, adm'rs, v. Burns, adm'r.

Richard Hall, adm'r, &c. in account, &c.

1844.

Oct. 1.	To merchandise, bill of bagging and rope rendered.....	\$36 19
23.	To cash paid J. F. Connely.....	\$396 88
	“ comm's advancing, 2½ per cent.	9 92

1845.

Jan. 27.	Interest to date.....	9 43
		<hr/>
		452 42

CR.

Jan. 21.	By net proceeds 21 bales of cotton.....	\$393 94
27.	Interest to date.....	53
		<hr/>
		394 47
	Cash received from R. Hall.....	57 95
		<hr/>
		\$452 42

R. Hall, the administrator, had charged himself in the account current with the whole amount of the sales of the cotton, and now claimed credit for the \$57 95, which he alleges to be the excess over the amount of the sales, and which he alledged he had not in fact received. This item of \$57 95 is stated in the record to be, the amount of an account against the estate of W. A. Hall, retained by the commission merchant, and sent to the administrator the amount of the sales, less the said sum of \$57 95; there was no evidence to show what the charge was for.

The court refused to allow either of these as credits, and the plaintiffs filed an exceptive allegation, and now assign these matters as error.

EVANS, for plaintiffs in error.

EDWARDS, contra.

ORMOND, J.—The court erred in refusing to credit the administrator with the amount paid Andrews on the mort-

gage. Although the mortgage was not recorded, it was nevertheless binding on the mortgagor and his administrator, and the latter could not prevent a sale of the slaves for the satisfaction of the debt secured by it. The arrangement which he made, to relieve the slaves from the *lien*, was beneficial to the estate, they being worth more than the mortgage debt, and was in effect the same, as if the mortgagee had caused the sale to be made, and paid him over the surplus.

The omission to register the mortgage, did not make it void as to the creditors at large of the mortgagor, but only as against such, who having no notice of the mortgage, have obtained a judgment against the mortgagor, and obtained a *lien* on the mortgaged estate, before the mortgagee by a sale, had obtained the benefit of his mortgage. [Ohio Life In. & Tr. Co. v. Ledyard, 8 Ala. 866.] Such appears to be the case here. None of these creditors of the mortgagor, appear to have acquired a lien on the mortgaged estate, previous to the mortgagee having obtained satisfaction of his mortgage; and as the administrator had not the power to prevent the sale of the slaves included in the mortgage, he is entitled to a credit for the amount due upon the mortgage paid by him, to the mortgagee; the effect of which, as already shown, was precisely the same as if he had suffered the slaves to be sold by the mortgagee.

The remaining question, growing out of the sale of the crop of cotton, appears to have been misapprehended by both parties, judging from the exception taken, and the ruling of the court. By referring to the account rendered by the commission merchants in Mobile, it appears that the administrator had obtained bagging and rope, and an advance of money, in anticipation of the crop of the estate, which, with interest and commissions, amounted to \$452 42. That the net proceeds of the crop, with interest to the time of stating the account, amounted only to \$394 47, leaving a deficit of \$57 95, which the administrator paid in cash. This last item, the administrator claimed to be allowed a credit for, having charged himself in his account, as stated with the court, with

the whole amount of the sales of the cotton. This is clearly a mistake. He should have charged himself with \$357 75, that being the net proceeds of the crop, after deducting the account for bagging and rope used about the crop, with interest from 21st January, 1845, and if not so entered, it must be corrected.

Let the judgment be reversed and the cause remanded.

MITCHELL v. SANFORD.

1. If the maker of a note makes a partial payment thereon to the payee, which the latter agrees to indorse on the note, but instead of doing so, brings suit and recovers judgment for the full amount of the note, which is satisfied, the maker cannot maintain an action for the partial payment, but should have availed himself of it as a defence *pro tanto* to the suit of the payee against him.

Writ of Error to the Circuit Court of Jefferson.

THE plaintiff in error declared against the defendant for money had and received, to which the defendant pleaded "non assumpsit;" thereupon the cause was submitted to a jury, who returned a verdict for the defendant, and judgment was rendered accordingly. From a bill of exceptions sealed at the plaintiff's instance, it appears that the plaintiff was indebted to the defendant previous to the commencement of this suit, between one and two hundred dollars by promissory note, and handed to the defendant seventy-five dollars, which he intended should be applied in part payment thereof. The note not being then present, the defendant promised to enter the sum handed him, as a credit thereon; but this he neglected to do, brought an action on the note, and recovered a judgment for the full amount expressed upon its face. This judgment was satisfied by the plaintiff, and this

suit then brought to recover the seventy-five dollars which the defendant had neglected to indorse on the note. The court charged the jury that the plaintiff was not entitled to recover in this action.

E. W. PECK, for the plaintiff in error, insisted that this case was unlike the cases in 3 Porter's Rep. 132, and 1 Ala. Rep. N. S. 103. In both those cases there was an actual contestation, here there was none. In both these cases, the payment was perfect, here the money was handed to the defendant (the note being absent,) which the plaintiff here intended should be applied as a payment, and which the defendant here promised to enter on the note, but did not do so. Here was an act to be done before it could operate as an extinguishment, &c., to wit, crediting it upon the note. Until this was done, it was money in the hands of Sanford, for the use of Mitchell, and as it never was credited upon the note it may well be recovered in this action.

Again, the judge erred in his charge, it took from the jury the power of deliberation; in other words, the court usurped the powers of the jury.

W. S. MUDD, for the defendant in error, contended, that *De Sylva v. Henry*, 3 Porter's Rep. 132, and *Broughton v. McIntosh*, 1 Ala. Rep. N. S. 103, were in principle similar to the present case, and are conclusive against the plaintiff's right to recover. The seventy-five dollars he handed to the defendant was, according to the evidence, a payment on the note, and when sued, he should have resisted a recovery to that amount.

COLLIER, C. J.—The case of *De Sylva v. Henry*, 3 Por. Rep. 132, we think is not distinguishable from the present. There the plaintiff paid to the defendant the sum of money, which was intended to be applied, as a partial payment of a note, which the latter had against him, but which was never thus applied; afterwards, the defendant sued the plaintiff on the note, and recovered a judgment for the full amount.

The court said, that as to the sum paid on the note, it was clear that the plaintiff could not recover it back—"he should have made this a part of the defence when sued on the note." In *Broughton v. McIntosh*, 1 Ala. Rep. 103, it is decided, that if judgment is obtained for a debt of which a part has been paid, but the payment is not interposed as a defence, the part so paid cannot afterwards be recovered by suit, although the judgment is satisfied; that the payment is the extinguishment of the debt *pro tanto*, and should have been used as a defence to the action. In both cases it was said, that a payment bears no resemblance to a set off, and that the defendant cannot recover, it in a subsequent action, though he fails to plead or otherwise avail himself of it as a defence. It does not appear that it was attempted in these cases, any more than in the present, to set up the payments either by way of plea or evidence, and a contestation upon other points, if this were so, would make no material difference as to the rule of decision that should be applied.

As soon as seventy-five dollars were handed by the plaintiff to the defendant, to be credited on the note, it was a payment *pro tanto*, and the note was thus far extinguished. The entry of a credit was not essential to consummate the payment, but could only have been required, in order that convenient and accessible proof of the fact might be furnished.

The charge is unobjectionable, if, conceding the truth of all the evidence, and the inference fairly deducible from it, the plaintiff is not entitled to recover. That he was not entitled to a verdict will sufficiently appear from what we have said. The judgment is consequently affirmed.

BRADFORD v. HAGGERTHY.

1. Where a precedent liability has been suspended or released by the acceptance of a note indorsed by one, liable on the former demand, the plaintiff cannot recover on the primary liability without showing the same proof as would enable him to recover on the indorsement; and therefore in the absence of such proof, there is no material error in excluding proof of the primary liability.
2. *Quere*—Whether the propounding of a question (improper in part) to a witness to be examined on interrogatories, is a sufficient reason to exclude the answer disclosing proper evidence, unless it appear the objection to the question was taken and notified to the opposite party before the commission issued.
3. The declaration or claim made by a person as to his place of residence, is not proper evidence to prove his residence. Such a declaration is merely hearsay, unless connected with some act concurrent with it, and which the declaration has the tendency to explain.
4. When the point to be ascertained was the residence of an individual previous to the 9th of July, his act in giving a vote and claiming his residence in a particular place on the first Monday of August afterwards, is not admissible evidence.

Writ of Error to the Circuit Court of Montgomery.

ASSUMPSIT by Bradford against Haggerthy as the indorser of a note made by one Pou. The declaration alleges that suit was brought on the note by Bradford against Pou to the county court of Tallapoosa county, that being the first court to which the suit could be brought after the note fell due, and Pou being there a resident.

At the trial, the plaintiff proved that he commenced suit against Pou in the county court of Tallapoosa county, on the 9th July, 1839; this suit was dismissed in consequence of the sheriff's return of not found, and a new suit instituted in Macon county, the 3d October, 1839. To this suit Pou pleaded a set off against Harbin or Harris, who was the payee of the note. The cause was continued and notice given to the defendant in this action of the defence interposed. The defence prevailed to the extent of the set off, and the plain-

tiff obtained judgment for the remainder only. The execution on this judgment was returned no property.

There was proof that the court to which Pou was sued in Macon county, was not the first court there after the maturity of the note.

The plaintiff put in evidence tending to show that Pou resided in Tallapoosa at the maturity of the note, and when the suit was there commenced. The defendant put in evidence tending to show that Pou then resided in Macon county, and amongst it offered to prove "that Pou in the year 1839, at the general election, cast his vote in Macon county, then claiming his residence in that county." This was objected to by the plaintiff, but was allowed by the court. It was shown to the court in this connection, that Pou, at the time of trial, was living in Mississippi.

The defendant offered in evidence these interrogatories, asked of a witness, with the answers :

Do you, or did you know the county of the residence of R. L. Pou in the year 1839, and the whole of said year, and particularly in the months of July, August and September; and where did he reside during those periods; in what county and State?

Answer. Pou's residence was in Macon county, during the whole of the year 1839.

Where did Pou reside when you first became acquainted with him—in what county; and if he changed his residence any time before the year 1840, to what county did he remove; and when did he change his residence?

Answer. He resided in Macon county, and did not change his residence before 1840.

These questions were objected to by filing exceptions that they were leading and irrelevant; but this was not brought to the notice of the court. At the trial, the answers were objected to, because the interrogatories seek to obtain a legal conclusion, instead of stating facts from which a residence might be inferred. The court overruled the objection.

The defendant then offered to read the following interrogatories and answer, to wit:

Where did Pou claim his home and residence during the fall and summer of 1839? Where was his washing done

during the months of July, August and September, 1839, and where did he claim his home the three named months?

Answer. He resided in Macon county, on his plantation, which is on the adjoining lot to ours, and he claimed that as his residence during the fall and summer of 1839; his washing was done at my house in Macon county, during the months of July and August, and until the 6th of September, at which time he was married, and until then claimed that county as his home or residence.

In what county and State did Pou claim his home and residence during the years 1838 and 1839?

Answer. He claimed the State of Alabama, and Macon county, his home and residence during the years 1838 and 1839.

These were objected to by the plaintiff, but also admitted.

The plaintiff offered evidence to show the consideration for the indorsement of the note was a liability of the defendant and a third person on a bill of exchange, which had been reduced to judgment against said third person. This was excluded by the court, as not within the issues.

The court charged the jury, that the declarations of Pou on the day of the general election, accompanying and taken with his vote on that day, was admissible, as tending to support the issues on the part of the defence.

The plaintiff excepted to this charge, as well as the several rulings of the court on the admission of evidence; and these are now assigned as error.

BELSER, MORRIS and MARTIN, for the plaintiff in error.

SETH P. STORRS and ELMORE, contra.

GOLDTHWAITE, J.—1. It was entirely immaterial to the consideration of this case, that the defendant had been previously liable to the plaintiff in another contract, as that liability was suspended, if not discharged, by the acceptance of the indorsed note. The rule in such cases is, that even when the creditor is allowed to consider the previous contract as an existing debt, and declares upon it, he is notwithstanding obliged to sustain his action by proof precisely the same as would be requisite if the suit was on the indorsement.

[Bates v. Ryland, 6 Ala. Rep. 668.] There was no material error therefore, in excluding the evidence offered in this connection, as it was entirely unimportant without the other proof, and unnecessary with it.

2. With reference to the form of the interrogatories, it may we think be conceded, that as the point in issue was the residence of Pou at the maturity of the note, (the 1st July, 1839,) or at the time when the writ to Tallapoosa county was issued, (the 9th July, 1839,) it was irregular to inquire where his residence was in the fall of that year; but is this irregularity in the mode of asking a question a sufficient reason to exclude the answer when the commission has been executed, and the answer contains evidence which is unexceptionable? We incline to the opinion that if any objections can prevail on grounds like these, it should appear they were taken and notified to the opposite party before the commission issued. It is unnecessary however to decide this point in the case, as there is another ground on which it must be reversed.

Declarations or admissions of living individuals not parties to the suit, or having such an interest in it as to render their admissions evidence, are never admitted, that we are aware of, except in explanation of acts transacting at the time of the declaration. [Greenl. Ev. § 123, 124.] It will be seen several of the interrogatories inquire into the fact of Pou's claiming a residence as entirely distinct from any other fact, and the answers, instead of giving his declarations explanatory of his acts, or showing they were made concurrent with the transactions or acts of which it is very possible they would be perfectly explanatory, proceed to state his declarations as a distinct matter of proof. This we think is clearly inadmissible, on the ground that it is merely hearsay, and would let in the declarations of persons who, if themselves examined as witnesses, might give a different account of the matter to be ascertained. [7 Cranch, 290; 3 Term, 708.]

4. The objection to proof of the fact that Pou voted at the August election in 1839, in Macon county, as well as his declarations at the time, were inadmissible, partly as against the same principle, but more particularly because the fact spoken of, as well as the declaration explaining or giving

Taliaferro, Adm'r, v. Brown, &c.

point to it, occurred after this controversy arose. We have before said the matter in issue was the residence of Pou when the note came to maturity, or when the first writ issued. Both these matters occurred previous to August, 1839, when the act of voting took place. It is clear therefore, that neither the act nor the declaration accompanying it can be said to have taken place *ante litem motam*, and for this reason should have been excluded. [Greenl. Ev. § 131, 132.]

Another question has been suggested at bar, which does not however arise in the bill of exceptions. It is, whether the residence in point of fact in the particular county where suit is brought, is essential, if the information of the plaintiff was such as to induce the impression that the residence was where the suit was commenced. This is certainly a matter which might well be considered if presented for decision; but that not being the case here, we decline to examine it.

Judgment reversed and cause remanded.

TALIAFERRO, ADM'R, v. BROWN, USE, &c.

1. G. having purchased from his partner a stock of goods, entered into a bond with surety, with covenants to the following effect: "Now therefore, be it known, that we, James Gillan, Neil Blue, Richard A. Colclough, W. A. Armstrong, John Martin, and Thornton Taliaferro, do hereby, for and in consideration of the sum of one dollar, to us in hand paid, by the said Shepherd Brown, the receipt of which is hereby acknowledged, as well as for the consideration aforesaid, covenant and agree to bind ourselves, our heirs, executors, &c. jointly and severally, unto the said Shepherd Brown, his heirs, &c., to save him harmless from the payment of all debts, or liabilities due from said concern, as well as all loss, liability or damage, that he has, or may incur, as a partner of the said Gillan. We jointly and severally guaranty, that the said James Gillan, shall fully satisfy and discharge all debts, dues, or demands, arising from said establish-

Taliaferro, adm'r, v. Brown, use, &c.

ment." *Held*, that this was a bond of indemnity against loss, or damage, and was not a covenant to B. against liability to suit.

2. When a cause is transferred from the orphans' to the chancery court, the latter will take it in the plight and condition it is then in, and proceed with it like other chancery causes, applying the law regulating such estates in the orphans' court.

Error to the Chancery Court of Montgomery.

THIS cause was transferred to the chancery court, from the orphans' court of Montgomery, on the 10th March, 1842; the estate was declared insolvent, and an order made to file claims by the first Monday in June, 1843. The claim of the defendant in error was filed. On the 3d October, 1843, it appears from the record, there was a cause on the docket of the orphans' court of the defendant against the plaintiff in error, and continued from time to time until the transfer to the chancery court, previous to which time the deposition of James Gillan had been taken, by order of the orphans' court, and returned.

The claim of the defendant in error is founded on a bond, as follows:

The State of Alabama, Montgomery county.

Whereas, a co-partnership has heretofore existed between Shepherd Brown, of Wythe county, Virginia, and James Gillan, of the town of Montgomery, Alabama, as merchant tailors and clothiers, which has this day been dissolved. The said business having been conducted in the name of James Gillan, and the said Gillan having purchased of the said Brown his entire interest in said business, consisting of all the stock on hand, debts and every thing else belonging to said business, and received the same, hath for and in consideration therefor, covenanted and agreed to secure and indemnify and save harmless the said Shepherd Brown from the payment of all debts, due from said concern, as well as all loss, liability and damage whatsoever. Now therefore, be it known, that we James Gillan, Neil Blue, Richard Colclough, W. A. Armstrong, John Martin, and Thornton Taliaferro, do hereby for and in consideration of one dollar to us in hand paid

Taliaferro, adm'r, v. Brown, use, &c.

by the said Shepherd Brown, the receipt of which is hereby acknowledged, as well as for the consideration aforesaid, covenant and agree to bind ourselves, our heirs, executors, &c. jointly, and severally, unto the said Shepherd Brown, his heirs, &c. to save him harmless, from the payment of all debts, or liabilities due from said concern, as well as all loss, liability or damage, that he has, or may incur, as a partner of the said Gillan. We jointly and severally guaranty, that the said James Gillan, shall fully satisfy and discharge all debts, dues, or demands, arising from said establishment.

In testimony whereof the parties have hereunto set their hands, and affixed their seals, this 28th October, 1837.

JAMES GILLAN, (seal.)

NEIL BLUE, (seal.)

R. A. COLCLOUGH, (seal.)

W. A. ARMSTRONG, (seal.)

JNO. AUSTIN, (seal.)

T. TALIAFERRO, (seal.)

There was also filed a list of liabilities still due from the firm, and claimed under the bond, amounting to about \$30,000.

The chancellor considered, that the bond was not only to indemnify and save Brown harmless from the payment of the partnership debts, but also contained an express covenant that Gillan would fully satisfy and discharge all the debts of the firm, and that this covenant was broken upon the failure of Gillan to pay any portion of the former debts, and decreed that the claim be sustained for the amount of the partnership debts unpaid, and a reference to the register, &c. &c.

The defendants prosecute a writ of error from this decree, and assign many errors, which are sufficiently noticed in the opinion of the court.

J. P. SAFFOLD, with whom was T. WILLIAMS, for plaintiff, in error. The chancellor erred in the construction he put upon the bond. The introductory clause of the agreement, the context, and the object to be effected, show the true meaning of the parties, and that it was intended as a mere bond of indemnity. Upon the construction put upon it, it was broken the moment it was made, a construction so high-

ly unreasonable, especially as it regards the sureties, that it should not be made without the clearest evidence that such was the intention of the parties. Without a suit or judgment against Brown, he cannot recover damages. [3 Bibb, 196; 3 B. Monroe, 307; 5 Ala. R. 615; 14 Johns. 177; 1 Saunders, 117, n. 1; 1 B. & P. 688; 1 Hill N. Y. 5, 6; 4 N. H. 497; 7 Johns. 358; 4 Mass. 627; 8 Johns. 198; Kirby, 396; 7 Wend. 503; 16 Pick. 147.]

The circumstances under which the agreement was made, the subject matter of the contract, the situation of the parties, the motives that led to it, and the object to be attained, may all be looked to, to get at the intention of the parties. [2 Ala. 434; 5 Id. 613; Platt on Cov. 136.]

Extraneous evidence is admissible to aid the construction of a written instrument, so far as to ascertain the circumstances under which it was made, and the subject matter which is done by the testimony of Gillan. [2 Ala. 445; 10 Mass. 379, 459; 2 N. H. 75; Fell on Guaranty, 116.]

The extent of the condition of a bond of indemnity may be restrained by the recitals, and this especially in the case of a surety. [4 Taunt. 593; Hurlston on Bonds, 32, 33, 109, 112.] And the letter of the condition departed from to carry the intent into effect. [3 Cranch, 229.] The condition of a bond is for the benefit of the obligor, and is to be construed most strongly in his favor. [Hurlston on Bonds, 32.] And words of doubtful import ought not to receive such a construction as to make the party using them liable for the debt of another. [Story on Con. 353.]

The concluding words of the covenant furnishes a key to all its difficulties, by that it appears a mere guaranty was intended. [4 Pick. 385; 8 Id. 428; 14 Id. 353; 18 Id. 534; 24 Id. 250.]

The undertaking of the sureties was for the performance of a contract previously entered into, as shown by the recitals in the bond, it was therefore void for want of consideration. The sum of one dollar recited in the bond, is merely nominal, and was never received. The original consideration between the parties to the first contract, will not support the subsequent engagement of the sureties. [6 Ala. R.

Taliaferro, adm'r, v. Brown, use, &c.

615.] This case is unlike *McKenzie v. Jackson*, 4 Ala. R. 230, there, there was a consideration in the receipt of the goods.

ELMORE and BELSER, contra. The covenant is, that Brown shall be saved harmless from "liability," and that the parties *will pay the partnership debts*. The express object is something more than to indemnify him from paying the debts. The intention is, that he shall in no event be obliged to pay or shall incur a liability to pay; but that he shall be *discharged and acquitted from the debts and all liability therefrom*. The parties covenant to pay, and thereby to save him from the liability to pay, and a right of action accrued to Brown the moment the liability occurred, and to the same extent. If the debts were not due, and they were not paid at maturity, the breach then occurred. If already due, a reasonable time is given for their payment before a breach can be insisted on. [8 Wend. 452; 8 Cowen, 639; 4 Rawle, 97; 2 Vermont 532; 4 Id. 209; 1 Chip. 164; 2 Bay. 145; 1 Freeman, Ch. 541; 1 Saunders, note 117; 3 B. Monroe, 307; 7 Ala. 799; 1 B. & P. 638; 7 Term, 97, margin; Hurlston on Bonds, 95; Shep. Touch. 385.]

Many other points were argued, and authorities cited by the counsel on both sides, but the view taken by the court renders it unnecessary to cite them.

ORMOND, J.—The principal question presented upon the record, and which indeed comprises the entire merits of the case, is, what is the true construction of the bond—is it a covenant to pay the debts of the firm, or was it intended to indemnify, and save harmless the retiring partner against the creditors of the firm.

The bond itself, which ought to be the surest index to the meaning of the parties, affords but little aid. It commences by a recital, that the object is to "secure, indemnify, and save harmless the said Shepherd Brown, from the payment of all debts due from said concern, as well as all loss, liability and damage whatsoever." Then comes a covenant to save him harmless from the payment of all debts, liabilities, &c. as a partner of the concern, and closes with a *guaranty*, that

Taliaferro, adm'r, v. Brown, use, &c.

James Gillan, the continuing partner shall fully satisfy and discharge all debts, &c.

If a controlling effect is given to some of these covenants, it is a mere bond of indemnity against loss, and the covenantee is not prejudiced, until he is injured, or at least exposed to injury by a suit being brought against him for the debts of the firm. If on the other hand, we select the covenant to pay the debts of the firm, it was broken by the omission to pay the debts as they become due.

The duty, as well as the purpose of the court, is, if possible to find out the intention of the parties, and if that is lawful, to give effect to it, and when, as here, the language employed is so ambiguous and contradictory, as to leave it doubtful what the parties did intend, we must call to our aid the surrounding circumstances, the object the parties had in view, and the state and condition of the parties, as well as the subject upon which the contract was to operate. We are, if possible, to give effect to the entire instrument, and if that cannot be done, from the repugnancy of its several stipulations, we must put such a construction as appears to comport best with the motives the parties had in view in entering into it. See this subject considered at large in *Watts v. Shepherd*, 2 Ala. 434.

The avowed object of the deed, was the indemnity of the retiring partner, Brown, against loss, from the debts due by the concern, and whether this bond was intended as an indemnity against the payment of these debts, or against liability to suit on that account, comports equally well with the object in view. The covenants of the deed will suit either view of the case, but in our opinion, the circumstances attending the transaction, enable us to declare that the purpose was that of indemnity merely.

In the first place, it is extremely improbable that Gillan, the remaining partner would enter into a covenant which would expose him to suit from Brown, if the debts were not paid at maturity, and also leave him exposed to a suit from the creditors of the firm. This presumption is greatly increased as it respects the sureties of Gillan to the bond, who would upon that assumption, not only be the indemnitors of Gillan to Brown, but in effect his surety for all the debts of the firm.

Taliaferro, adm'r, v. Brown, use, &c.

This view is greatly strengthened by the fact, that a large amount of the debts was due at the time, and upon the supposition that it is a covenant against liability to suit, they became liable to a suit as soon as the bond was made, or at least in a reasonable time after.

In *Lewis v. Crocket*, 3 Bibb, 196, this is considered as a controlling fact in doubtful cases. The court say, the distinction seems to be between a covenant or condition to indemnify against a debt, or duty already incurred, and a covenant or condition, to indemnify against a debt or duty which may accrue in future. In the former case, the covenant, or condition, is not broken without suit, in the latter a mere liability to suit is a breach of the condition, or covenant. This principle is again recognized, in the case of *Robertson v. Morgan*, 3 B. Monroe, 307. Some of the debts were not due at the time the covenant was made, but it is impossible to hold, that the same words should have different meanings, as applied to different parts of the same instrument. The question here is, as to the intention, and if that is ascertained, it must control the entire instrument.

The concluding part of the condition, is, to say the least, of very doubtful import. The sureties, "*guaranty*, that the said James Gillan shall fully satisfy and discharge all debts," &c. We cannot suppose that the parties used this term in its ordinary acceptation, as a commercial guaranty, as this would be directly at war with other portions of the bond, equally entitled to be considered as just exponents of its true meaning. It was doubtless used in its popular sense, of indemnifying or saving harmless. It is in fact a warranty merely against loss or damage.

These remarks would have no place, if the language of the bond was clear, and explicit, but in exploring this doubtful instrument, to ascertain by the dubious light it affords, the intention of the parties, we are constrained to consider the probable inducements to entering into it, and the consequences of the construction contended for. A consideration of these, has led us to the conclusion, that it was intended by the parties as an indemnity merely against loss, or damage, and not a covenant against liability to suit. It follows that Brown cannot recover upon it, until he shows that he is damaged,

either by being compelled to pay the debts, or possibly by suit being brought against him for their recovery. For illustrations of these principles, see Lord Arlington v. Murrel, 2 Saunders, 412; Pearsall v. Summersett, 4 Taunton, 493; Douglass v. Clark, 14 Johns. 177; Boynton v. Dalrymple, 16 Pickering, 147; Prescott v. Truman, 4 Mass. 627, and Hurlston on Bonds, 112, where the English authorities are collated.

The cases cited on the other side, do not militate against these views. In the cases upon bonds given by a deputy to his principal, for indemnity against a breach of duty, the plain intention is to save the principal harmless from suit. Besides, in such cases, the covenants are always prospective, and look to the future for their operation, and thus fall directly within the rules here laid down; such was the case cited in 3 B. Monroe, 307. Nor indeed is there any difference of opinion on this subject. All agree that the intention, when it can be ascertained, will control the language. Thus in the matter of Negus, 7 Wend. 499, cited on the other side, the court say, "If a bond in which the obligor covenants affirmatively to pay certain sums, concludes with a covenant to indemnify and save harmless the obligee, it does not therefore become a mere bond of indemnity, unless such appears from the whole instrument to have been its only object." Similar principles are avowed in Chase v. Hinman, 8 Wend. 452.

The case of Laroque & Hatch v. Russell, 7 Ala. 798, has no application here. The court in that case merely gave effect to the contract of the parties. The principal, by giving his own note to the surety, payable at a particular time, was understood as stipulating, that the surety might then sue upon it, whether he had sustained actual damage or not.

This conclusion disposes of most of the questions raised by the assignment of errors; as however the case must go back, it is proper to remark, that in our opinion, it was not the intention of the legislature, in authorizing the transfer of cases like this to the chancery court, when the judge of the orphans' court was incompetent to sit, that the chancellor was *pro hac vice*, to sit merely as a judge of the orphans' court. In the case of insolvent estates, such as this, in which

Taliaferro, adm'r. v. Brown, use, &c.

by the act of 1843, issues are to be tried by a jury, it is manifestly impracticable. And if the chancellor should direct the issues to be tried at the bar of the circuit court, sitting as the court of chancery does but once a year, several years would elapse before an estate could be settled. Such a result as this could not have been contemplated by the legislature, as the consequence of the transfer. We therefore conclude, that in all cases transferred from the orphans' court to chancery, the chancellor will take them in the plight and condition they are in at the time of the transfer, and proceed with them as in chancery cases, applying the law regulating such estates in the orphans' court, changing only the mode of procedure, in the same manner as if the cause had originated in his court.

Let the decree be reversed, and the cause remanded for further proceedings in conformity herewith. The defendant in error will pay the costs of this court.

On motion of the defendant in error, the cause was re-argued.

HAYNE and N. HARRIS, for defendant in error.

T. WILLIAMS and J. SAFFOLD, contra.

ORMOND, J.—This case having been again argued, and having given to it a deliberate re-consideration, we are constrained to abide by the judgment heretofore pronounced.

The only question is, what was the intention of the parties? The covenant is ambiguous, inasmuch as it is by its terms a covenant of indemnity merely against loss, and also a covenant against liability to suit. This is admitted by the counsel for the plaintiff in error, but it is insisted that the rule in such cases, is to give effect to the covenant against liability, as it is not inconsistent with, but includes the other covenant against loss. The authorities principally relied on, in support of this position, are *Chase v. Hinman*, 8 Wend. 452; *Webb v. Pond and Lansing*, 19 Id. 423; *Ex parte Negus*, 7 Id. 499; and *Port v. Jackson*, 7 Johns. 479.

We do not understand the court to hold in these cases, especially in *Ex parte Negus*, and *Chase v. Hinman*, that when

these covenants are found together, they are conclusive of the intent, but that in such a case, the covenant is broken as soon as the covenantee is exposed to a suit, unless it can be gathered from the entire instrument, considered in connection with the character and purpose of the parties, that the object was indemnity merely, and in all of them, an elaborate examination is made of the surrounding circumstances, as evidence that the parties did not intend an indemnity merely, but a covenant against liability to suit.

Assuming this to be a sound exposition of the law, what are the prominent facts attending this transaction? They are, that Brown was selling his interest in a partnership to Gillan, his co-partner, the latter receiving all the effects of the firm, and becoming bound for the payment of the debts, a large amount of which were then due. If this covenant was between these parties, we think it would be entirely reasonable to infer, that Gillan undertook to pay the debts, as he could not otherwise secure Brown against "liability" from those debts, and it would seem altogether proper, that the remaining partner, receiving the effects of the firm, should pay the debts himself. But this reasoning, cogent as it is, when applied to these parties, loses much, if not all its force, when applied to those persons who signed the instrument as the sureties of Gillan. He, as one of the partners, was already responsible to the creditors of the firm, but these sureties were not in that condition. To hold them responsible, if the retiring partner was subjected to liability to suit, would be an undertaking on their part, (at least to the extent of the debts then due,) to pay the debts presently. A construction such as this, ought not to be put upon their undertaking, unless their covenant, in clear and explicit terms, admits it. Even where a surety did use these clear and explicit terms, it has been held that the circumstances would control the language, and convert it into a bond of indemnity.

Such was the case in *Douglass v. Clarke*, 14 Johns. 177. There, one Rice had given his bond to the collector, for the payment of the duties on stills, with Douglass as his surety; and Clarke gave to Douglass a counter bond, by which he bound himself to pay off and discharge the bond which Rice

Taliaferro, adm'r, v. Brown, use, &c.

and Douglass had executed, and to save harmless and indemnify Douglass against loss, damage, &c. The court held that the good sense and just interpretation of the bond was, that it was a bond of indemnity merely, and that the words pay off, and discharge, were thrown in without being understood to require the defendant Clarke, actually to pay off the bond. The ground of this construction was, the fact that Rice, and not Clarke, was the person primarily liable.

The case *ex parte* Negus, 7 Wend. 499, would be the counterpart of this, if Brown and Gillan were the sole parties to the covenant. There Negus covenanted to indemnify the retiring partner, and also to pay off the debts. The reasons given for the opinion are, that there was an express covenant on the part of Negus to pay the debts of the firm, and although a covenant to indemnify followed, that did not alter the force and effect of the preceding covenant; that the true question was, what was the intention of the parties; that as Negus had the means to pay the debt in his own hands, and the other partners had withdrawn from the concern, it was clearly the intention, that Negus should pay them. The court distinguish this case from *Douglass v. Clarke*, previously cited, saying, "here Negus assumes the debts of the partnership—he makes them his own individual debts. He is the person to pay, as was Rice in the case of *Douglass v. Clarke*; he is not a mere surety, as Clarke was." This case clearly recognizes the distinction we are now taking.

The case of *Chase v. Hinman*, *supra*, does not materially differ from the preceding. There, also, was a covenant to indemnify, united with a covenant to pay, or against liability to suit. The court went into an elaborate examination of the facts, and deduced from them, that the intention was to covenant against liability to suit. The facts are too complex to be stated intelligibly, within reasonable limits, but it differs from this, in the important particular that the covenantor was the person liable to pay, and did not stand in the condition of a surety.

The case of *Port v. Jackson*, *supra*, is supposed to be entirely analogous to this. The facts were, that Port leased from one Barlow certain premises for an unexpired term of 1600 years, and covenanted to pay him a yearly rent of £32,

17s. This term Port afterwards assigned to Jackson, taking from him a bond, by which he covenanted to keep, perform, and fulfil, all the covenants, conditions, &c. which Port had entered into with Barlow. Port sued Jackson upon this covenant, and the court held that it was broken, if the rent was not paid by Jackson to Barlow, when it fell due.

This case is supposed to be like the case at bar, because, as is urged, it is a covenant to pay the debt of another. It was in effect, if not in terms, a positive undertaking on the part of Port, to pay a certain sum for the rent of the land. Neither the terms of the bond, nor the object the parties had in view, authorized the interpretation that a mere indemnity was intended. Jackson was not a surety, stipulating that another should pay a debt, but was binding himself to do an act, and had in fact received the consideration for its performance, in the assignment of the leasehold estate. In this aspect, the case is entirely unlike the case at bar, where the party sought to be charged is a surety, and who certainly does not in terms, covenant to pay the debt himself. The case of Webb v. Pond and Lansing, *supra*, is a mere reiteration of the law as laid down in Chase v. Hinman.

So far then as we have considered this covenant, we think the fact, that the debts, or a large portion of them, were due when the covenant was entered into, and that the parties were mere sureties for Gillan, sufficiently indicates, that indemnity against loss, was what the parties contemplated at the time. The instrument is very obscure, and was evidently written by persons ignorant of the technical effect of the language employed by them. This is more apparent when we consider the last stipulation: "We jointly and severally guarantee, that the said Gillan shall fully satisfy and discharge all debts, dues and demands, owing from the said establishment;" which it is insisted is an express stipulation on the part of the sureties to pay the debts of the firm if Gillan did not.

It is an established rule of construction, that the whole instrument must be taken together; it would be manifestly unjust to select a single portion, and give effect to it, disregarding the rest. The construction contended for, involves the

idea of a contract entered into by the sureties, independent of the contract of their principal, which would convert this instrument into two bonds, one by which Gillan undertook to pay the debts, and another by which the sureties guaranteed his performance of that contract. We know of no authority for doing this. The parties made but one bond, which the principal and his sureties executed jointly. The condition therefore must apply to all the obligors, and as it is impossible to suppose that Gillan *guaranteed* to Brown that he would perform his own covenant, it follows inevitably, that the term is not employed by the parties in that sense, and the most rational conclusion from other parts of the instrument is, that it was used in the sense of warrant, or indemnify.

In *Elliott and Perkins v. Mayfield and wife*, 4 Ala. 422, a bond executed by two executors of an estate, with sureties, was held to be several in its effect, as it respected the principal, for which each set of sureties was bound. But that construction was forced upon the court, by the express language of the condition, which recited for which executor each set of sureties was to be answerable, and there was therefore no room for doubt, that it was not the intention of the sureties to become jointly bound for the acts of both executors. Such is not the case here. There is nothing on the face of the instrument, indicating that there was any distinction between the duties assumed by the principal and the other obligors as his sureties. The instrument is entire, and we cannot make such a decision as will destroy its unity, unless it manifestly appears, that such was the intention of the parties.

But if it were conceded, that this is a promise by the sureties to pay the debts of the firm, in the event Gillan did not, certainly this is not an unconditional promise. The debts which Gillan was to pay are not enumerated in the bond, and they were strangers to the firm. Before they could be liable on their engagement, it must be ascertained, not only that Gillan failed to discharge them, but also that they were notified of the fact. This results from the conditional nature of a guaranty, which is to answer for the payment of some debt, or the performance of some duty, in the event of the failure of another person, who is liable in the first instance.

[Lawson v. Townes, 2 Ala. 375; Douglass v. Reynolds, 7 Peters, 126.] There is no pretence here, that these debts have been ascertained, or any notice given in a reasonable time to the sureties, that Gillan had not complied with the contract, but after the lapse of many years, suit is instituted on the bond as an unconditional promise on the part of the sureties.

For the reason however previously given, we think the undertaking of the parties, whatever it was, was joint, and imposed the same liability on all the obligors.

If Gillan were the sole party to this bond, we should be inclined to think, contrary to our first impressions, that the construction contended for by the defendant in error, was correct; but as others are parties to it, who are mere sureties, such a construction must be put upon it, as will preserve its unity. It cannot be held to mean one thing as it respects Gillan, and another as it regards his sureties; and in our judgment, the last clause of the bond is conclusive to show, that they did not intend to subject themselves to a present and immediate responsibility, which as a considerable portion of the debts were then due, would be the effect of holding it a covenant to pay, or to indemnify Brown against liability to suit. The object the parties had in view, is satisfied by considering the bond an indemnity against loss or damage, and for that they have expressly provided, by one of the covenants of the bond. Others are added, creating a doubt whether something beyond an indemnity was not intended to be provided, but looking to the facts of the case, and the condition of the parties, the most reasonable construction appears to us to be, that the parties intended an indemnity merely.

COLLIER, C. J.—I have carefully examined the authorities cited and commented on in the opinion of the court, and cannot persuade myself that they sustain the conclusion there attained. The bond, the construction of which is drawn in question, recites that Gillan "covenanted and agreed to secure, indemnify and save harmless the said Brown from the payment of all debts due from the said concern, as well as all loss, liability and damage whatever."

Gillan and the intestate of the plaintiff in error say that we "covenant and agree to bind ourselves, our heirs, &c. unto the said Brown, jointly and severally, to save him harmless from the payment of all debts and liabilities due from said concern, as well as all loss, liability and damage that he has or may incur as a partner of the said Gillan. We jointly and severally guarantee that the said Gillan shall fully satisfy and discharge all debts, dues and demands owing from the said establishment."

The different clauses of a written instrument must be construed together, whether they precede or follow; and the court must not allow to a particular expression a controlling force; but the intention must be gathered from the whole instrument, unless it is obvious the parties intended otherwise. [Bates and Hines v. The State Bank, 2 Ala. R. 451.] And such a construction shall, if practicable, be placed upon a contract as will make every clause operative. [Watt's ex'r v. Sheppard, 2 Ala. Rep. 425.] These principles of construction, when applied to the writing in question, are to my mind convincing that the obligors stipulated not only for an indemnity against *loss*, but against *liability* also; and that Gillan should pay the debts of the concern. They were then bound to extinguish the demands against the firm of Gillan & Brown within a reasonable time, and a failure to do so, subjected them to an action for a breach of their covenant. Entertaining these views, I am constrained to dissent from the opinion of my brother.

BALDWIN, ET AL. V. GULLY.

1. In a summary proceeding by motion at the suit of a sheriff against his deputy, under the act of 1828, for the failure to pay over money collected by the deputy on an execution, in consequence of which judgment had been

rendered against his principal it was shown that between the receipt and return of the execution, the deputy paid the sheriff \$19,615 87, but upon no particular account, and the receipt given by the latter did not indicate how it should be appropriated. The sheriff's clerk could not tell whether the money received on the execution in question had been paid to the sheriff; but it was shown that from ten to twenty-five thousand dollars of the money collected by the deputy during the time he acted for his principal was unaccounted for: *Held*, that upon this evidence the court was warranted in rendering judgment for the sheriff.

Writ of Error to the County Court of Tuscaloosa.

THIS was a proceeding under the statute, at the suit of the defendant in error as the sheriff of Greene, against Baldwin, his deputy, and the sureties of the latter in a bond executed for the performance of his duties as such. The defendants in the motion were informed that a notice had been served upon the sheriff, that the President and Directors of the Bank of the State of Alabama, would move the county court of Tuscaloosa for a judgment against him, for the amount collected upon a writ of *feri facias* at the suit of the Bank against Lemuel D. Hatch, Thomas R. Borden, and Benjamin Borden; which motion was still pending in that court. They were further informed, that whenever judgment shall be rendered against the sheriff, that he will move the county court for judgment against them for the whole amount thereof and costs, for the failure and neglect of the deputy in not paying over the money collected by him [on the execution referred to.

The cause was submitted to the court upon evidence adduced by the parties, and the facts out of which the controversy arises may be thus condensed; the defendant, Baldwin, was the deputy of the plaintiff, the sheriff, and his co-defendants were the sureties in his bond; the execution in question was in Baldwin's hands to make the money thereon, and the indorsement of satisfaction is in his hand-writing. It was also proved that the bank had recovered a judgment against the sheriff for the default in the non-payment of the money collected on the execution. Between the receipt and

return of the execution, Baldwin paid his principal \$19,615 87; these payments were not made on any execution in particular, and it was the practice of the office, for the deputy, when he paid in money, to take receipts for the amount, without expressing upon what account the money was collected, and how it should be appropriated. The clerk in the sheriff's office, who testified to the mode of doing business there, did not know whether the money collected on the execution had been paid or not.

It was proved on the part of the deputy, that he had collected about \$250,000 under his deputation, "nearly all of which had been receipted for," in the manner above stated.

The sheriff's clerk made out an account current between the sheriff and his deputy, which showed a balance of money unaccounted for by the latter of \$25,000 dollars; but it was stated by another witness, that he thought he discovered mistakes in this account to the amount of \$15,000. An effort had been made by the sheriff and his deputy to settle, but they had been unable to agree upon a statement of their accounts. The court gave judgment for the plaintiff.

E. W. PECK, for the plaintiff in error, insisted that the plaintiff below was not entitled to a judgment in this summary proceeding, but his remedy was in chancery, where an account could be taken between the parties, or by action at common law on the defendant's bond. [Clay's Dig. 536, § 11.]

P. MARTIN and B. F. PORTER, for the defendant in error, insisted that the judgment of the county court was well supported by the evidence.

COLLIER, C. J.—This proceeding was instituted under a statute passed in 1828, which enacts, "whenever judgment shall be rendered in any court against a sheriff, for any failure or neglect of duty, or misconduct in office, and it shall appear to the satisfaction of the court, that such failure, &c. is the failure, neglect, or misconduct of his deputy, it shall be the duty of the court, on motion of the sheriff, to render judgment against such deputy and securities in favor of the

principal sheriff, for the whole amount of the judgment, and costs, rendered by the court against such principal sheriff, by reason of such failure, neglect of duty, or misconduct of said deputy: for which execution may issue as in other cases: *Provided*, that the deputy or his sureties shall have one day's notice of the pendency of the proceeding against the principal sheriff.

It is insisted, that the proof recited in the bill of exceptions, is not such as authorized the judgment that was rendered. We cannot think that the act requires the proof to be so convincing as to leave no room to doubt that the failure, &c. of the sheriff, was the failure, &c. of his deputy. It is quite enough that the mind of the court be satisfied by an application of the ordinary tests by which truth is evolved from disputed or doubtful proof. If thus scanning the evidence, the balance inclines against the deputy, then it may be said, that *it appears to the satisfaction of the court* that the official neglect of the sheriff is attributable to him.

The proof warrants the inference, that Baldwin collected, during his connection with the sheriffalty, from ten to twenty-five thousand dollars more than he accounted for. True, he paid over near twenty thousand dollars during the time the execution in question was in his hands, yet it does not appear that this was all the money collected between its receipt and return, or that all this was not paid before the execution was satisfied. The case was made out on the part of the plaintiff, when he showed that the execution was satisfied by a payment to Baldwin, and then it devolved upon the defendants to relieve themselves from liability, by proof that the money had been duly accounted for, or paid over by him. Upon this point the evidence was inconclusive and unsatisfactory, in the several particulars stated.

We cannot conceive why the sheriff should be forced into equity to adjust the entire accounts between himself and his deputy, or why he should be required to institute an action upon the bond. The ground upon which he asks a judgment is legal, and one for which the statute gives the summary remedy, which has been adopted. We have seen that

he has *prima facie* entitled himself to a judgment, and if the defendants can show a sufficient cause for equitable interference, they must become the actors in chancery. We have only to add, that the judgment is affirmed.

WHITE v. STROTHER, ET AL.

1. To let in the exemplification of the probate of a will in the courts of this State, under the act of Congress, no particular form of certificate by the clerk is necessary. If the record is attested by the clerk, and his attestation is certified by the presiding judge to be in due form, it is immaterial how the attestation is made.
2. In an action of trover to recover slaves, it is irregular to ask a witness whether some of the slaves were reputed by the family of the defendant as the children of another of them. To let in the declarations of third persons, in cases of pedigree, it must be shown they are dead.
3. The acts and conduct of slaves towards each other, as family conduct, may be shown in evidence, and the conduct of a slave child in calling another slave mother, is a circumstance which may be proved to a jury, to identify the relation of mother and child.

Writ of Error to the Circuit Court of Greene.

TROVER, by Strother, et al. against White, for the conversion of certain slaves.

At the trial, the plaintiffs claimed title to the slaves, as the legatees of one Medley, and offered in evidence the probate of his will, in Madison county, Virginia, in these terms, to wit: "At a court held for Madison county, 25th July, 1822, this last will and testament of Reuben Medley was produced in open court, and proved by the oaths of Richard H. Field, and William Glassel, two of the witnesses thereto, and ordered to be recorded."

The certificate of the clerk is in these words, to wit: In testimony whereof, I, Belfield Cave, clerk of the said county,

White v. Strother, et al.

certify the foregoing to be a true copy, and hereto affix the seal of my office, and subscribe my name, this 14th day of May, 1840.

BELFIELD CAVE, Cl'k.

The certificate of the judge is in these words, to wit: I, Richard C. Booton, presiding judge of the county court of said county, certify that Belford Cave is the clerk of said court, and that his certificate next above is in due form. Given under my hand, this 14th May, 1840.

R. C. BOOTON.

Attached to this paper is the certificate of the Governor of Virginia, under the seal of the State, that R. C. Booton, is presiding justice of the county court of Madison county, Va.

The defendant objected to this evidence on the ground that the certificate of the clerk was insufficient. The objection was overruled and the will admitted.

To identify the slaves, and prove that four of them were children of Silvey, another one of the slaves sued for, a witness for the plaintiff, who during the year 1844 was the overseer for the defendant, was asked whether the four slaves were reputed by the family of the defendant, as the children of Silvey. The defendant objected to this question, on the ground that it should be limited to the defendant himself. The objection was overruled, and the witness answered they were so reputed.

The witness was then asked by the defendant if he had ever heard any of the white family of the defendant say that the four slaves were the children of Silvey, to which the witness replied, he did not recollect that he had, but his impression was, she was so regarded, or reputed, by both white and black. This witness was then asked by plaintiff, whether he had ever heard these four slaves, call the negro Silvey mamma. To this question the defendant objected, but the court allowed it. The witness then answered he had heard them call Silvey mamma.

The defendant asked the court to charge the jury, that if they believed the information of the witness, that these four

slaves were the children of Silvey, was derived from what was said by the slaves, and not from what was said by any of the white members of defendant's family, then the evidence was improper, and insufficient, and should not be considered in making up their verdict. This charge the court gave, with the qualification, that if the four slaves had been in the habit of calling Silvey mamma, that was a circumstance for them to take into consideration, with the other circumstances of the case, to identify the slaves in suit.

The defendant then asked the court to charge the jury, they should not consider as proper evidence any conversations of any of the negroes of the defendant. This was given, with the same qualification as above stated.

The defendant excepted to the several rulings of the court, and they are now assigned as error.

A. GRAHAM of Greene, and J. B. CLARKE, for the plaintiff in error, insisted—

1. The certificate of the clerk to the paper purporting to be a copy of the will and its probate, is insufficient—1. [Because it does not state *whose* will is certified. 2. It does not state the copy to be a transcript of the *last* will of Medley as of file in his office. 3. Or that it is a *record* of such last will. 4. Or that the probate is a true copy from the records of his office. 5. Or that there was *any* probate of the will. [Dig. 619, § 1; Tarlton v. Briscoe, 1 A. K. Marsh. 67; Woodley v. Finley, 9 Ala. 716; Bright v. White, 8 Missouri, 422; 1 Greenl. Ev. § 505; Allen v. Allen, Minor, 249.]

2. The question asked the witness, and the charge of the court, that his answer showed a circumstance which might be considered, was the conversation of a slave, and therefore irregular. [Fox v. Lambden, 3 Halst. 275; Glover v. Millings, 2 S. & P. 43; Park v. Hopkins, 2 Bailey, 403; Nettles v. Harrison, 2 McCord, 230; 1 Pick. 245; 3 Marsh. 226; Jackson v. Brown, 18 John. 37; Gregory v. Baugh, 4 Rand. 615.]

WOMACK, contra, contended—

1. The certificate was sufficient. [Brown v. Adair, 1 S.

& P. 49; *McRae v. Stokes*, 3 Ala. R. 401; *Lee v. Hamilton*, Ib. 529.] The court will not look beyond the particular objection taken. [*Helen v. Wideman*, 10 Ala. R. 846.]

2. The evidence admitted, as well as the charge of the court, was proper. [Greenl. Ev. 116 to 120; *Jackson v. Cooley*, 8 John. 99; *Jackson v. King*, 5 Cowen, 237; *Phelps v. Foot*, 1 Conn. 387; *Gregory v. Baugh*, 4 Rand. 616; *Cowen & Hill's Notes*, 619; *Pool v. Bridges*, 4 Pick. 378; 11 Pick. 309; *McNeal v. Reynolds*, 9 Ala. R. 313.]

GOLDTHWAITE, J.—1. The act of Congress does not prescribe the form of certificate by which the clerk of a court in a sister State shall certify the record to make it evidence in another State, or indeed that any certificate shall be made by that officer. The record is proved whenever there is the attestation of the clerk with the seal of the court annexed, if there be a seal, together with the certificate of the presiding judge, that the *attestation* is in *due form*. It is therefore the certificate of the judge which establishes the validity of the form pursued by the clerk, and it can make no difference what this form is, when the subject matter attested shows itself a matter of record. Every objection to the attestation of the clerk must therefore resolve itself into a mere question of form, whenever his name and his office is disclosed on the record by any mode of attestation, and is concluded by the judge's certificate. For example, if a deed or other matter, not one *prima facie* of record, was the subject of exemplification, the certificate of the judge would not be sufficient to let in the copy, but the law making it a record would also have to be shown. [*Mitchell v. Mitchell*, 3 S. & P. 81.] But when the subject matter is a judgment, or probate of a will, the presumption is, that these are every where matters of record. This seems well settled by numerous decisions here and elsewhere. [*McRae v. Stokes*, 3 Ala. R. 401; *Lee v. Hamilton*, Ib. 529; *Ferguson v. Harwood*, 7 Cranch, 408; *Smith v. Blagg*, 1 John. Ca. 238.] The case of *Allen v. Allen*, Minor, 240, referred to, is not a decision on the form of the clerk's certificate, though so stated in the head note, and was probably decided on the ground there was no

sufficient certificate of a judge, as the one set out in the report is evidently defective. We think there was no error in allowing the exemplification to be read as evidence.

2. The question asked the witness as to the reputation in the defendant's family of the relation between Silvey and the other slaves, does not come within the rule of hearsay evidence, as applicable to proof of pedigree. Hearsay evidence is never admissible, even in such cases, except to prove the declarations of *deceased* persons. [Phil. on Ev. 238; Greenl. Ev. § 103.] The reputation of relationship, if it existed, in the family, must have arisen from the knowledge of the fact, in some of the members, and their subsequent declarations to others, or from the acts and conduct of the slaves themselves, or of the whole members of the family, towards them, and in either case the individuals making the declaration, or witnessing the acts and conduct, would furnish better evidence.

3. We must not confound this reputation, which is evidently nothing more than hearsay, with the acts and conduct either of the slaves themselves towards each other, or of the family towards them. Such conduct and acts would, we think, be proper evidence to go to a jury, on the same principle as obtains in cases kindred to those of pedigree, where *family conduct* is the subject of inquiry. The tacit recognition of relationship, the disposition and devolution of property, and many similar facts and circumstances from which the opinion and belief of those who must be presumed to know the fact, may be inferred, is certainly entitled to much consideration. [Greenl. Ev. § 105.] If the witness had been asked, what the treatment of these slaves in regard to a supposed relation between them was, in the family, it would in our judgment have been entirely proper, within the rule just quoted. It is to this class of evidence that the conduct of the children towards their supposed mother belongs. If the former called the latter mother, we can perceive no just ground to exclude the evidence, any more than to exclude proof that the latter had nursed them when infants.

On the whole case, the only error seems to be the allow-

ance of the question as to the general reputation in the family of the relation between the slaves.

For this error the judgment is reversed, and the cause remanded.

FAULKNER AND FAULKNER v. CHANDLER.

1. Upon a motion to enter satisfaction of a judgment, affidavits of the parties are admissible; and an affidavit of payment is *prima facie* sufficient, unless contradicted by the other party.
2. A garnishment may be sued out on a judgment, though no execution has been issued on it.
3. Objections that the costs are too large, must be made in the court below, and cannot be raised for the first time in this court.
4. An objection to the admissibility of an entire record, will not authorize the objector to raise a question in this court, relating to costs alone.

Error to the Circuit Court of Chambers.

THIS was a motion to enter satisfaction of a judgment, made by the defendant in error. He sets forth in his petition, that on the 20th October, 1842, W. G. Faulkner, for the use of E. Faulkner, recovered a judgment against him for \$228 66. That on the 25th October, 1842, he was summoned as a garnishee by the Montgomery Bank, to answer what he was indebted to the said Faulknors. That he answered, admitting the indebtedness to the amount of the judgment aforesaid, and thereupon a judgment was rendered against him as garnishee for \$224, which judgment he has fully paid; yet the Faulknors are endeavoring to coerce payment of their judgment, &c. The prayer is, that satisfaction be entered.

Upon the trial, as appears from a bill of exceptions, the parties submitted all the questions of law and fact to the

court. The parties were then informed by the court, that they could submit affidavits if they thought proper, and thereupon Chandler made affidavit to the facts stated in his petition, and that he had paid the judgment rendered against him as garnishee to the bank, which fully discharged the judgment of the Faulkners against him. He also introduced a transcript of the record of Montgomery circuit court, of a judgment obtained by the bank against the Faulkners for \$196 17, and \$10 31 costs, rendered on the 27th November, 1841, with the proceedings in the garnishment suit upon that judgment, and judgment against him as garnishee for the amount of the judgment and costs, and interest thereon from the 27th November, 1841, upon which an execution issued, which is indorsed, settled in bank.

The defendants declined to make affidavit, and objected to the introduction of the records above set forth, as well as to the allowance of the affidavit of the plaintiff. The court ordered a satisfaction of the judgment to be entered with costs against the *appellant*.

This judgment was rendered at the fall term, 1844, and at the fall term, 1845, was amended and corrected, *nunc pro tunc*, so as to adjudge costs against the Faulkners in favor of Chandler.

The defendants prosecute this writ, and assign for error—

1. The admissions of the records from Montgomery circuit court.

2. In receiving the affidavit of Chandler.

3. In ordering satisfaction of the judgment.

4. In rendering a judgment *nunc pro tunc*.

5. In not dismissing the *supersedeas*.

J. FAULKNER, for plaintiff in error.

The affidavit for the garnishee process, was insufficient in not showing that an execution had issued; and had been returned "no property found." [Clay's Dig. 259, § 1; 260, § 3-7.]

The judgment of Faulkners was in force as to the costs, and they had the right to recover them.

The costs of the garnishment were put down at \$9, when in fact it should have been but \$2. All other cost is properly

chargeable against the garnishee, and not against the defendant in execution. [Clay's Dig. 231.]

The whole evidence is insufficient to prove payment, and the court erred in ordering satisfaction in the first instance, and had no authority to render the judgment *nunc pro tunc*, if the record evidence had been sufficient to authorize it.

RICE, contra.

1. The motion to enter satisfaction of a judgment is an application to the equitable powers of the common law courts—powers inherent in those courts, and always exercised to prevent an unjust or improper use of their process. The exercise of these powers is a *quasi* substitute for the jurisdiction of chancery in ordering the satisfaction of judgments at law. The motion at law must be governed in some sort by chancery proceedings; and each party to the judgment may be examined as witnesses, or may submit written affidavits to the court. [Lockhart v. McElroy, 4 Ala. R. 572; Mobile Cotton Press v. Moore & Magee, 9 Porter, 679; Abercrombie v. Connor, et al. 10 Ala. R. 293.]

2. The defendant in error has pursued the very course, pointed out to him in *this very matter* by this court. [Chandler v. Faulkner and Faulkner, 5 Ala. R. 567.]

3. If the parties on such a motion are present, and by agreement submit it to the court; and the court announces to all the parties that he will receive their affidavits; each party may submit an affidavit. And if one of the parties fails or refuses to make an affidavit, he does not thereby commend the equity or justice of his case, and he will not be heard to complain of the just effort of the court to search the conscience of all the parties. The allowance of affidavits of the parties in such cases, is just,—is the usual and convenient practice,—and is within the discretion of the court, and not revisable. [McLendon v. Jones, 8 Ala. R. 298.]

4. The evidence shows full satisfaction. And the court below decided correctly in amending the judgment *nunc pro tunc*. Can the plaintiffs in error revise the judgment *nunc pro tunc* and the first judgment entered, on this writ of error?

ORMOND, J.—When this cause was here at a previous term, (5 Ala. 567,) we held, that Chandler could not go into chancery to obtain satisfaction of the judgment of Faulkner against him, upon the ground that a court of common law was fully adequate to grant him the proper relief, by directing satisfaction to be entered. The course which has been pursued is the one pointed out by this court, and the only question is, whether he has proved that the judgment has been satisfied.

The payment alledged was by the discharge of a judgment, obtained by the Montgomery bank against Chandler, as a debtor of Faulkner, upon garnishee process, sued out upon a judgment of the bank against Faulkner, and it is now contended, that the affidavit of Chandler was improperly received to establish the fact, that he had paid to the bank the judgment against him as garnishee. This is an equitable proceeding, and we can see no objection whatever to the admission of such proof, which would be of no avail, if contradicted by the oath of the opposite party; and this we understand to be the customary course in such cases. In addition, the execution which issued against the garnishee, is indorsed satisfied by one professing to act for the agent of the bank. We cannot doubt that the proof was quite sufficient, at least *prima facie*, that the judgment was satisfied.

But it is urged that the garnishment was so defective that no judgment could rightfully be entered upon it. The objection is, that the affidavit was insufficient to authorize the garnishment to issue, because it does not alledge that an execution had issued on the judgment, and had been returned "no property found."

The act of February, 1818, (Clay's Dig. 259, § 1,) gave this right to the plaintiff, where an execution had been returned "no property found," on affidavit being made to the court, and a suggestion that another had effects of the defendant in his hands, a garnishment issued to such person returnable forthwith.

By the act of November of the same year, (Ib. § 2,) the right to sue out garnishee process was given immediately on the rendition of a judgment, upon making the oath required by the statute. By the act of 1823, (Ib. § 3,) upon the

same oath being made before the clerk of the court, he was required to issue process of garnishment returnable to the next term of the court. This act evidently did not contemplate that the affidavit would be made during term time only, as there was no necessity in that view for the passage of the law; and as the act of 1823 did not require as a pre-requisite, that an execution should be returned "no property found," it appears to cover this case.

But the act of 1837, (Clay's Dig. 260, § 7,) is still more explicit. That act gave this remedy to the plaintiff in whose favor a judgment had been rendered, by making the necessary affidavit, either in or out of term time. In the former case, it directs the process to be returned forthwith; in the latter to the next term of the court; and as this statute gives the remedy whenever a judgment has been rendered, and does not require that an execution should have issued, or have been returned, it is conclusive upon the question. By the express terms of the act, it is made applicable to judgments rendered previous to its passage, and it would be difficult to assign a reason, why it should apply to previous, and not to subsequent judgments. Nor is such a law liable to abuse, as every one would prefer making his money by execution if practicable, by an execution on his judgment, instead of resorting to the troublesome and dilatory process of garnishment.

The objection that the judgment against the garnishee was not so great as that in favor of the plaintiff in error, is predicated upon the supposition, that the costs entered in the garnishment suit were too large. Costs were taxed in the garnishment suit against the garnishee at \$9; it is now insisted they should have been but \$2. If it had been intended to raise that question in this court, the question should have been made in the court below, either by a motion to re-tax the costs, or in some other mode. But it does not appear from the bill of exceptions that this objection was raised in the court below. It is certain that a judgment was rendered against the garnishee for \$9 costs, and that he has paid it, and the propriety of this judgment, cannot in the present condition of the record, be questioned.

Campbell's adm'r v. Campbell's creditors.

The judgment of the bank against Chandler as garnishee, was equal in amount to the judgment of Faulkner against Chandler, with the exception of the costs of the former, against the latter, which it appears was \$59 37; and it is now insisted, the judgment should not have been ordered to be satisfied, as to these costs.

It does not appear that this question was raised below. The whole controversy there was as to the admissibility of the record evidence, and of the affidavit of payment, and the plaintiff in general terms in his affidavit declares that the judgment was satisfied. In addition we find in the record, an execution which issued on the judgment of Faulkner against Chandler, upon which are returns showing that the costs have been paid.

The right of the court to perfect its judgment, at another term of the court, by a judgment *nunc pro tunc*, is unquestionable, and doubtless the testimony afforded by the record itself, was quite sufficient to demonstrate the mistake which had been committed by the clerk in the entry of the judgment.

Let the judgment be affirmed.

CAMPBELL'S ADM'R v. CAMPBELL'S CREDITORS.

1. The act of 1843, "to amend the laws now (then) in force in relation to insolvent estates," applies to all claims which are filed against the decedent's estate, where an exception is taken in the manner pointed out by the act, for the want of an affidavit; and although the claim be evidenced by a *judgment*, an exception to it will be allowed, if it is not duly verified.

Error to the Orphans' Court of Pickens.

In July, 1845, the estate of the plaintiff's intestate was du-

ly declared insolvent, and the settlement thereof continued until January, 1846. Several of the creditors filed their claims without verifying them by affidavit, and for this cause the plaintiff objected in writing to their allowance as a charge against the estate; but the court being satisfied of their justness, from the intrinsic evidence they afforded, and the proof in their favor, the objection was overruled, and the claims charged upon the estate.

B. W. HUNTINGTON, for the plaintiff in error. The statute in relation to filing claims against an insolvent estate, makes an affidavit necessary in all cases where one is demanded. [7 Ala. R. 923; 8 Id. 454.]

No counsel appeared for the defendant.

COLLIER, C. J.—The ninth section of the act of 1843, entitled “an act to amend the laws now in force in relation to insolvent estates,” enacts, that every person having a claim against the estate of a deceased person which has been declared insolvent, by the orphans’ court, shall file the same in the clerk’s office of that court, within six months after such estate is declared insolvent; and every such claim shall be verified by the affidavit of the claimant; and the clerk shall give a receipt therefor, &c.; “and if no opposition shall be made to the allowance of such claim, in the manner hereinafter provided, within nine months after the time when the said estate was declared insolvent, such claim shall be admitted and allowed as a valid claim against the said estate, without further proof.” [Clay’s Dig. 194, § 10.]

In *Hollinger, et al. v. Holly, et al.* 8 Ala. R. 454, it was said, the direction that each claim shall be verified by the affidavit of the claimant, does not make the affidavit indispensable to the allowance of the claim, when no exception is taken to its omission in the manner pointed out by the act. “The creditor or administrator may doubtless require the claimant thus to verify his claim, but if no exception is taken, there seems no sufficient reason to reject the claim.” In the present case, one of the claims rejected was a judgment of the circuit court of

Pickens, and lest it may be supposed that the dignity of the evidence by which it is attested exempts it from the requisition of the statute, it may be remarked that the act is explicit in its terms, and applies alike to all claims, whether supported by parol or record evidence. The exception was taken to the want of an affidavit in due form, and within proper time, and should have been sustained. For the error of the orphans' court in ruling otherwise, its decree is reversed and the cause remanded.

MILTON v. ROWLAND.

1. Where a deposition is supposed to be irregularly taken, the party may re-take under an order of court, and that even when the cause is called for trial, and the other party has announced himself ready for trial, but is unwilling to waive exceptions to the deposition.
2. Although the omission to notify the opposite party in writing of the time and place of taking the deposition, may be good cause to suppress it, if the fact of notice is denied, yet a verbal notice is sufficient, if the fact of notice is not denied.
3. It is no error affecting the judgment of a cause, that the court for its own information, makes inquiries of a physician as to the extent of knowledge usually possessed by midwives.
4. When the answer of a witness in a deposition asserts that her experience in the particular avocation of a midwife enables her to judge of particular diseases in females, and the opposite party omits to test her knowledge or experience by a cross-examination—*Quere*, if the objection will lie to answers stating her opinions and belief.
5. Any person may speak of the existence of disease in another, when the disease is perceptible by the senses.
6. An exception to a deposition, to each answer, and to each sentence of each answer, amounts to nothing more than a general exception to the deposition.
7. When there is a warranty of a personal chattel, the law does not impose on the buyer the duty to return it, if the warranty is untrue, but he is allowed to keep the chattel and sue for the breach of warranty.

8. When the purchaser of a slave, warranted sound, subsequently sells it for an advanced price, the expenses and trouble he has been at does not furnish the *sole* measure of damages for the breach of warranty. The price subsequently obtained, at a fair sale, is a circumstance which may go to the jury as one of the means to ascertain the value of the chattel.
9. When the question raised on the evidence is the breach of a warranty, a charge in reference to the law arising out of a fraud is abstract.
10. Error assigned on charges which were not excepted to at the trial, cannot be examined in this court.

. Error to the County Court of Benton.

ASSUMPSIT by Milton, payee of a promissory note, against Rowland, its maker.

At the trial term, and previous to the call of the cause, the defendant made affidavit that one Mrs. Stoner, residing in the town of Jacksonville, was a material witness for him at the trial. On the same day of making the affidavit, the defendant gave a written notice to the plaintiff, that he should proceed, at 12 A. M. of next day, to take the testimony of this witness, at the house of Michael Stoner, in the town of Jacksonville, before certain named commissioners, or either of them. At the time and place designated, the plaintiff appeared, for the purpose of cross-examining the witness, but the defendant stopped the examination, and said he would not proceed unless the plaintiff would waive all exceptions to the commission. This the plaintiff refused, and the commissioner left the place, as well as the attorneys for both parties—the defendant's attorney informing the plaintiff he would get a new commission, and return immediately to take the deposition. Immediately afterwards a new commission was issued, and the defendant proceeded to take the deposition of the witness, without the plaintiff being present. No notice was given other than as above stated.

When the cause was called for trial, the defendant filed the deposition thus taken, and obtained an order to publish it, and this order was made after the plaintiff had announced himself ready for trial. The defendant asked the court to postpone the trial to allow him to retake the deposition, or to continue the cause, inasmuch as the plaintiff refused to

waive all objections to the commission. The court thereupon made an order to retake the deposition, and a new commission issued. The witness resided less than half a mile from the court house, and the court directed the defendant to inform the plaintiff when the commissioner should start for the house of the witness, and that would be sufficient. The defendant gave the plaintiff a verbal notice, that the deposition would be taken the next morning, at 7 o'clock. The deposition was taken without the presence of plaintiff, and without any other notice than that just stated. The certificate of the commissioner shows the commission was executed between the hours of seven and nine o'clock of the day indicated in the verbal notice, which was the day after that indicated in the written notice first before stated.

The plaintiff objected to the order to retake the deposition, and also to the notice, as being illegal, insufficient, and untimely—as made during the session of court, and after the cause was called for trial.

He also objected to the deposition, that it was taken on a different day and hour from that designated in the first notice. The objections were all overruled, and the deposition read.

Several questions were propounded on the part of the defendant, the object of which was to elicit her knowledge, whether a certain female slave and child were diseased. She answered, that she was called in her capacity of midwife—which she had pursued for twenty years—to visit a female slave named Harriet, in the possession of the defendant, and found her, on the 10th or 12 of February, 1843, diseased with the *gonorrhœa* in its last stages. The child was also diseased in consequence of sucking its mother's milk. She also stated, that her experience enables her to judge of this disease. She also answered, the slave was affected at the same time with *prolapsus uteri*, brought on, as the witness believed, because of the former disease, and in consequence of taking medicines for it which weakened the system.

The plaintiff objected to each of the answers of the witness, and to each sentence of each answer, but the court allowed them to be read.

When objection was made to these answers, the court, for

its own information, asked several questions of a physician, who answered, the practice of midwifery did not necessarily involve the knowledge, or the ability to judge of the existence of *gonorrhœa* or *prolapsus uteri*, but a midwife, from her frequent association with weak and delicate women, would be likely to recognize the latter disease, particularly if she made a personal examination. The plaintiff objected to this examination, but the court overruled him.

The court then decided the answers, so far as they spoke of the disease first named, were incompetent evidence, but admissible as to the other. Afterwards, by agreement between the parties, the evidence of the witness as to both diseases was read to the jury, the plaintiff to have the benefit of his exception, if either was illegal. There was no proof of Mrs. Stoner's medical skill, other than contained in the deposition itself.

The defendant then offered evidence tending to show the note on which he was sued was given in part payment of the price of the female slave and her child sold to him by the plaintiff, and warranted sound, on the 24th January, 1843. It was also in evidence, that the slave then appeared to be sound, and that two months afterwards she appeared to be unsound, but the defendant then sold the slave, without the child, for \$600. No proof was made of any offer by the defendant to return the slave and rescind the contract. There was also evidence tending to show the slave was sound and healthy from her infancy up to the time of sale; also, that she was sick a short time after the sale, and that the plaintiff, at the sale, represented her to be *enceinte*.

The plaintiff asked the court to charge the jury—

1. That the defendant could not avoid the payment of the purchase money, *entirely*, unless the slaves were tendered back.

2. That if the note given by the defendant for the slave, and the defendant within three months afterwards, sold her for an advance, although the slave was unsound, yet the only reduction on the note to which he was entitled, was for the expense and trouble incurred in consequence of her disease.

3. That the defendant was not entitled to a greater reduc-

tion on the note, than the amount of injury sustained by him in consequence of the sickness of the slave.

4. That when the vendee does not rescind a contract, upon the discovery that the vendor has committed a fraud, he cannot avoid the payment of the purchase money *in toto*.

The 1st, 2d and 4th charges were refused, on the ground they were abstract, and the 3d given, with the qualification that the amount of injury sustained by the defendant, was the difference between the value of the slave if sound, and her value in the condition she was at the time of the defendant's purchase.

The plaintiff excepted to the several rulings of the court, and the bill of exceptions sets out the charges actually given to the jury, but these were not excepted to.

The assignment of errors opens all the questions mooted at the trial, and also questions the correctness of the charges given.

T. A. WALKER, for the defendant in error.

S. F. RICE, contra.

GOLDTHWAITE, J.—1. The only material question growing out of the circumstances attendant upon this deposition is, as to the authority of the court to make the order under which it was taken. If, as it is fair here to assume, the defendant had ascertained the deposition in the first instance, was irregularly taken, there is no reason why he should wait until the objection was sprung by his adversary. All that a liberal practice should require, or a strict one demand, is, that the opposite party should not be put to expense, and trouble, of a new examination, if willing to abide by the first. Having refused to waive objections to the deposition, or rather commission, as it was, the court had the same power to direct it to be taken over as it had in the first instance. And this is the sum and substance of what was done.

2. Some stress is laid on the fact, that the notice of the retaking of the deposition was merely verbal. The statutes do not prescribe the notice shall be in writing, though the usual practice is for it to be so; but however well the omission to give the notice in writing might justify a court in

suppressing a deposition, when the fact of notice is denied by the opposite party, we think the form or manner of notice is of no importance, when one in point of fact is proved, and not denied on the other side. The statutes evidently leave the time, as well as the manner of notice, a matter of discretion with the court or officer allowing the commission. [Dig. 164, § 1, 2; 167, § 15, 16.] Though it is possible this discretion does not extend beyond a personal notice to the party or his attorney. [McEwen v. Morgan, 1 Stewart, 190.]

3. The fact that the court for its own information, and probably to guide its own judgment, made inquiries of a physician as to the extent of information usually possessed by those practising as midwives, is not a matter which affects the case. If the judgment on the point presented is right, it matters little how the information was got at, and if wrong, the medium of information will not prevent the reversal.

4. It is insisted however, that the answers of the witness must be considered as giving her opinion only, that the death of the child was caused by sucking its mother's milk, and that the *opinions* only of persons of skill in the particular matter are evidence. It will be seen the witness was questioned as to her experience in such matters, and very possibly a cross examination on this point would have rendered it certain that she either did, or did not, possess the skill and science to authorize her opinions to be received. It would be going very far to exclude testimony on the ground that a particular fact was not proved when the examination itself was of a general matter which presupposed the information or skill to speak of it. [See Carson v. Bank, 4 Ala. Rep. 148.]

5. But however the rule is to be applied in cases generally, we think the party here is not entitled to raise the question, as it was not raised in the court below. The exception taken at the trial, so far as any thing is specific, is to the allowing the witness to speak of the existence in the slave, of particular diseases. Now we apprehend the most ignorant witness may be permitted to state the *fact* of disease, when open to the perception of the senses, though he

might not be so skillful in the cause, or causes, as to enable him to give his opinion as evidence to govern a jury. The question raised at the trial was, whether what the witness said as to the slave's being afflicted with particular diseases, was admissible, but is now turned into one as to the capacity of the witness to speak of the causes of the child's death. We are clear there was no error in admitting the answers as to the diseases, and as to the opinion, if the question had been raised at the trial, that might have been examined into further, or rejected entirely.

6. If it is contended the exception taken is sufficiently broad to cover every sentence of the answer, we reply that this general mode of reserving a matter will not be sufficient. An exception to each interrogatory, or answer, and to each sentence of the same, is no more specific than one made in gross to the entire deposition. Is the court to stop and criticise and scrutinize a deposition when such an exception as this is taken? The object of an exception should be to call the attention of the court to some specified defect in the proceedings, so that a considerate judgment may be given upon it, and that the opposite party, if necessary, may waive it if improper, or sustain the position if necessary by other evidence. When sufficient information for this is not afforded, there is no merit in the exception.

7. Coming then to the charges which the court refused to give, at the instance of the plaintiff, the first may be disposed of, with the brief remark, that when there is a warranty of a personal chattel, the law does not impose on the buyer the duty to return it if the warranty is untrue; but he is allowed to keep the chattel and sue for the breach of warranty. [Stephens' N. P. 1295, and cases there cited.] Such being the rule, there was no error in refusing this charge.

8. The second charge involves to some extent the same question which arises out of the qualification of the third. It is as to the true measure of damages for the breach of warranty of the slave under the circumstances in proof. In the recent case of *Anderson & Willis v. Dudley*, at this term, we had occasion to consider this question, and a majority of the court then held the measure of damages to be the difference between the value of the article as warranted to be, and its

value in the condition it was at the time of the warranty. The qualification of the third charge is in accordance with that decision, but it is supposed that when the thing is afterwards sold at the same or a greater price than was paid for it, the only measure of damages is, the expense and trouble necessary to bring it to this condition. The case of *Hogan v. Thorington*, 8 Porter, 428, is cited as sustaining this distinction. The question there was, not whether the expenses, &c. were the only damages which could be allowed, but whether they were recoverable at all. We then said, "it is not for the warrantor to object, that the purchaser has been amply compensated by the increased price at which he sold the slave. This resulted, doubtless, from the demand, and in consequence of the enhanced value of such property in market, at the two periods of the purchase and sale. The unsoundness of the slave when the warrantor parted with her, contributed nothing to such a result, she would have been sold by the purchaser for as much, if she had then been sound, and no expenditure of money by him would have been necessary. It is then clear the purchaser has sustained a loss by the breach of warranty, or rather has been prevented from realizing the profit he was entitled to, by so much as the sums paid for medical attendance diminished it." From this quotation it will be apparent, the court then considered the purchaser was entitled to recover as damages, the value between the thing as it was, and its value as represented to be, and that the price afterwards obtained was a criterion by which the difference in value might be estimated. The same distinction was held by Lord Denman in *Cox v. Walker*, 6 A. & E. 523.] The price at a fair subsequent resale is then not conclusive as furnishing the rule, though it certainly is a circumstance which may be given in evidence to the jury, as one of the means to ascertain the value of the chattel. Although it would have been more proper to have explained the influence that the subsequent sale had on the cause in ascertaining the amount of damages sustained by the breach of warranty, we cannot say there was error in refusing the charge as requested, inasmuch as it assumes the only reduction which the defendant was entitled to, was a

Patterson, et als. v. The Officers of the Circuit Court of Mobile.

sum sufficient to cover the expenses and trouble in healing the slave.

9. The last charge was properly refused, if for no other reason, on that assigned by the court. There was no evidence of fraud in the sale, as distinct from the warranty, and we have already stated the rule, that in such cases the purchaser is not bound to return the chattels. The case of *Barnett v. Stanton*, 2 Ala. Rep. 181, has no application to this, under the circumstances in proof, for it does not appear, the defendant insisted there was a rescission of the contract.

10. Although errors have been assigned on the charges which the court gave, these cannot be revised here, because no exception seems to have been taken in this connection.

We have thus examined the entire case, and find nothing to warrant the reversal of the judgment.

Judgment affirmed.

COLLIER, C. J.—I concur in affirming the judgment, but refer to my opinion in *Willis & Robertson v. Dudley*, for what I consider a correct view of *Hogan v. Thorington*.

PATTERSON, ET ALS. V. THE OFFICERS OF THE CIRCUIT COURT OF MOBILE.

1. Several plaintiffs having distinct interests, cannot unite in a motion against the sheriff.
2. A judgment for costs, cannot be rendered in favor of any one, but a party to the suit. One cannot be rendered on motion, in favor of the officers of court.
3. A judgment in favor of the "officers of the circuit court of Mobile," is a nullity, and no writ of error can be sued upon it.

Writ of Error to the Circuit Court of Mobile.

Patterson, et als. v. The Officers of the Circuit Court of Mobile.

A NOTICE was given to the plaintiff in error as sheriff, and others as his sureties, that a motion would be made against him and his sureties, for costs and damages, "in the following cases, being on executions put in your hands, as sheriff of said county of Clarke, which issued from the circuit court of Mobile county, and which you have failed to return, viz: " Here follows a list of cases of different plaintiffs, and defendants, with a statement opposite each, that it is for costs, and when returnable. The notice is signed by A. Brooks, clerk of the circuit court of Mobile county, and was returned executed.

The entry upon the Motion docket was—

Officers of Mobile Circuit Court;	} Motion v. sheriff to pay over costs in the following cases.
vs.	
Patterson and his sureties.	

This motion is again repeated in the judgment entry, and a judgment rendered, that the plaintiffs recover of the defendants, the costs in the following cases, to wit: Then follows a list of the cases separately, a statement of the amount of the judgment for costs, when returnable, that the same was received by the sheriff and was not returned. "Altogether amounting to the sum of six hundred and fifteen dollars, together with the costs of this motion, for which execution may issue."

Many errors are assigned, for which see the opinion of the court.

BLOUNT, for the plaintiff in error, cited 7 Ala. R. 154.

ORMOND, J.—The notice is given in this case, by the clerk of the circuit court of Mobile county, to recover of the sheriff, by motion, the costs in four cases, rendered in favor of different persons, and against different defendants, because as alledged, he had failed to return the executions.

If this motion were made by the persons in whose favor the judgments for costs were rendered, it would necessarily fail, as they could not unite in making a joint motion against the sheriff, their interests being several. [Gary v. Hathaway,

Patterson, et als. v. The Officers of the Circuit Court of Mobile.

6 Ala. R. 165.] Nor if the parties could thus unite, could a judgment be rendered in their favor upon a notice by the clerk of the court, as seems to have been attempted in this case, though perhaps the term "plaintiffs," used in the judgment may have been intended to refer to, and embrace the different individuals, who were "the officers of court;" which, from the caption placed at the head of the judgment, and on the minute docket, was doubtless the style of the case in the court below. It is so considered in the proceedings in error. The writ is sued out against the "officers of the circuit court of Mobile," and the bond to supersede the execution is made payable to them, by that designation. The true interpretation therefore of the term, "plaintiffs," as used in the judgment, is "officers of court."

In *Gary v. Boykin*, 7 Ala. R. 156, we had occasion to consider this question, and there held, that the summary remedy given by our various statutes, were for the benefit of suitors in the courts, and did not apply to officers, who seek to recover costs only. Nor indeed do we know of any authority for the rendition of a judgment in favor of the officers of court for costs, either collectively by that appellation, or in favor of each individually, for his separate proportion. Our statute authorizing a judgment for costs, gives it to "the party in whose favor judgment shall be given." [Clay's Dig. 316, § 20.] A judgment for costs then is an incident of the judgment in the cause, and must be in favor of, and against a party to the cause. It is manifest the officers of court are not parties to the suit. The judgment when rendered, is unless otherwise directed, a judgment for costs also, against the unsuccessful party, and by the act of 1826, when they cannot be recovered of the defendant, an execution may issue against the plaintiff, for all costs created by him in obtaining his judgment. [Clay's Dig. 316, § 23.]

But although this judgment is wholly irregular, it cannot be corrected in this mode; for want of the necessary parties. The judgment in favor of the "officers of court," by that appellation, is such a nullity that no execution could issue

upon it, and if one should issue, it would be superseded and quashed. The writ in this case is not prosecuted against any individual or individuals. Who the "officers of the circuit court of Mobile" are, no where appears, and as no judgment can be here rendered against them, the writ of error must be dismissed. [Joseph, adm'r, v. The Legatees of Joseph, 5 Ala. R. 280.]

Writ of error dismissed.

BEASON v. RIDDLE.

1. A suit instituted before a justice of the peace and removed by appeal to the circuit or county court, is to be regarded as a case *at law*, and the unsuccessful party must be charged with all costs by the appellate court; unless the case shall come within the act of 1824, which provides that where the defendant appeals, and the plaintiff recovers less than the judgment of the justice, the appellate court may in its discretion give judgment against either party for the costs; or where a successful plaintiff appeals and recovers no more than was adjudged to him by the justice, he shall pay all costs.
2. Where the successful party is improperly charged with the costs, though he objected to such a judgment, the error is not a mere clerical misprision, amendable on motion in the court rendering the judgment, or in the supreme court at the costs of the plaintiff in error; but is a ground for the reversal of the judgment.

Writ of Error to the Circuit Court of Randolph.

THIS was a suit commenced before a justice of the peace, by the plaintiff in error against the defendant, and a judgment being there rendered against the plaintiff for costs, he removed the case by *certiorari* to the circuit court. The amount in controversy being less than twenty dollars, the cause was submitted to the court upon the evidence adduced

by the parties; whereupon it was determined that the proof established the plaintiff's demand for two dollars and twenty cents, and a judgment was rendered in his favor for that sum. It was further considered that each party recover of the other one half the costs, and executions were ordered to issue accordingly.

S. F. RICE, for the plaintiff in error, insisted that the circuit court having ascertained the defendant's indebtedness, and rendered a verdict in the plaintiff's favor, and thus given him the redress which the justice denied, he was entitled to full costs. He cited Clay's Dig. 315, § 12-16; 316, § 20.

FAULKNER, for the defendant, contended that in the imposition of costs in a case of such a trivial character, the circuit court might impose costs upon the one party or the other in its discretion; and that the judgment in this respect was not subject to revision. He cited Clay's Dig. 314, § 10; 315, § 12; 350, § 26; 6 Ala. Rep. 476; 8 Id. 656; 9 Id. 615.

COLLIER, C. J.—The act of 1814 provides that in appeals from justices of the peace, where the amount in controversy does not exceed twenty dollars, the court shall try the same *de novo*, &c. [Clay's Dig. 314, § 10.] And the act of 1819 enacts that the court before whom such appeals are brought shall proceed to try the same according to the justice and equity of the case, without regarding any defect in the warrant, *capias*, summons or other proceedings of the justice of the peace before whom the same was tried. [Id. 315, § 12.] By a statute passed in 1807, it is declared that costs in equity shall be paid by either party at the discretion of the court. [Id. 350, § 26.] These several enactments it is insisted invest the court trying a cause removed from a justice of the peace with authority to tax either party with all the cost, or so to apportion it between them as may be thought best.

Another section of the act last cited provides that "in all cases in civil actions, the party in whose favor judgment shall be given, or in case of non-suit, dismissal, or discontinu-

ance, the defendant shall be entitled to full costs, except when it is or may be otherwise directed by law." [Clay's Dig. 316, § 20.] A statute passed in 1824, enacts that "whenever the defendant in any cause that shall have been decided by a justice of the peace, shall appeal from the judgment of such justice, and the appellate court shall render judgment in favor of the plaintiff for a less sum than that recovered before such justice; such appellate court may render judgment for the cost of such appeal either against the plaintiff or defendant, according to the justice of the case: but where the plaintiff or successful party shall appeal, and shall not recover more than was adjudged by the justice of the peace, in that case he shall pay all costs." [Id. 315, § 16.] These provisions the plaintiff's counsel contends are conclusive to show that the defendant should have been charged with all the costs.

Although the act of 1819 contemplates the proceedings of a justice of the peace when removed by appeal, with much toleration, and requires that the trial shall be had upon principles of equity and justice, neither that nor any other statute makes them either in terms or by construction cases in equity. Like other suits at law, the party who is unsuccessful, either in the prosecution or defence, shall pay all costs; and the court has no discretion to prevent such a result; unless the case comes within one of the two categories provided by the act of 1824. The plaintiff is not affected by this statute; first, because he did not recover in the circuit court less than he did before the justice of the peace; and secondly, because he recovers more. It follows then, that the judgment against the plaintiff for costs cannot be supported.

The objection is not a mere clerical misprision, amendable here at the costs of the plaintiff in error. It was a point controverted in the court below, and one on which it directly acted, and to which exception was taken. We have only to add, that the judgment is reversed, and here rendered in favor of the defendant in error for \$2 and all the costs before the justice, as well as the costs in the circuit court.

SPENCE v. THOMPSON.

1. Counts in debt for the statute penalties for extortion may be joined with one for money had and received, where the entire recovery goes to the party aggrieved.
2. On a statute providing the officer shall be liable in damages to the party aggrieved for four fold the fees illegally received, an action of debt will lie.
3. It is only necessary in a count on the statute to alledge that certain sums other and higher than those allowed by law, amounting in all to a sum named, were illegally demanded and received by the defendant as an officer, under certain process.
4. The circumstance that illegal fees are collected by a succeeding sheriff as due to a preceding sheriff, and paid over to him, is no defence to the statute action for extortion.
5. Proof of the receipt of a less sum than stated in the allegation, will sustain it; and proof that *higher* fees were received than allowed by law, is equivalent to proof that *other* fees than the law allows were received.
6. The return of a sheriff on a preceding execution that he had levied on slaves, is not evidence that he kept them for any definite time, so as to warrant a charge for their keeping, the time of keeping not being stated in the return.
7. When money has been illegally exacted, no demand is necessary to enable the party to maintain an action for money had and received.
8. Where in an action of debt, the verdict is in damages, for which judgment is given, this irregularity is not available on error.

Writ of Error to the Circuit Court of Talladega.

DEBT, by Mrs. Thompson, against Spence.

The declaration contains several counts—the first of which states the cause of action to be, “that the defendant wrongfully and illegally as sheriff of said county, demanded and received of and from the plaintiff, under and by color of a certain *fi. fa.* [which is set out] for executing the same, and for his fees as sheriff upon the same, a higher sum of money and more and other recompense than is by law allowable, permitted and appointed; that is to say, divers sums, amounting in the whole to \$9 43 more, other and

larger than his fees upon said execution," *contra formam statuti*, and from which the liability is deduced, to pay four fold the said fees so unlawfully received. The second and third counts describe other executions, and state the demand and receipt of illegal fees in the same form—in the one of \$21 39, and in the other of \$91 54. The fourth is an *indebitatus* count for money had and received. The defendant demurred severally to each count of the declaration, and also to it as entire. The court overruled the demurrers.

At the trial, the plaintiff gave in evidence the receipt of the defendant to one Shelly as her agent, for \$126 28, as in full of an account thus stated :

Tarleton, Abrams & Co.	} Judgment—May, 1843.	\$127 25
v. E. A. Thompson.		Interest
		<hr/>
		\$137 52

Paid exchange, 10 per cent.....13 72

Sheriff's fees..... 9 72

Court costs..... 9 43

\$32 87

D. Roberson,	} Judgment—Nov. 1840.....	1538 56
v.		12 mo's interest
E. A. Thompson.	}	<hr/>
		1661 60

Sheriff's fees.....91 54

Court costs..... 1 87—93 41

\$126 28

This was admitted against the objection of the defendant.

The plaintiff then read in evidence two writs of *fi. fa.* in the above entitled cases, in the first of which the sheriff is directed to levy \$127 25 damages, and \$10 43 costs, and in the other \$1538 56 damages, and \$2 87 costs. Both appear to be returned satisfied by the defendant as sheriff. This evidence was also admitted against the objection of defendant.

There was evidence conducing to show that one Griffin was the defendant's predecessor in office, and that he had

made a levy or execution for the larger sum. The plaintiff also read in evidence certain entries on the execution docket of the clerk, in relation to various executions issued in said cases, showing a levy by Griffin on certain slaves.

The defendant offered in evidence another *fi. fa.* issued in the case for the larger sum to the defendant as sheriff, on which he returned a levy on certain slaves, and that the sale was postponed by the plaintiff in the suit.

It was also proved, that the defendant had paid Griffin, the former sheriff, his fees as charged, but the amount was not ascertained.

On this state of proof the defendant asked the court to charge the jury—

1. That if they found that a part of the costs and commissions taken by the defendant were taken for Griffin, and demanded for him and paid to him by the defendant, then the plaintiff could not recover the statute damages for the excess paid Griffin, and so demanded and collected for him.

2. That to sustain the counts in the declaration charging the defendant with taking *other* and higher fees than the law allowed, the plaintiff must show the defendant had received fees for services for which the law allowed no fees.

3. That if there was no proof other than the levy by the defendant on the *fi. fa.* of his having taken the slaves therein mentioned into his possession, the presumption was he did so take them, and he is allowed 25 cents per day for keeping them, and that the jury might look to this in ascertaining his fees.

4. That it was incumbent on the plaintiff to prove the excess of fees precisely *as charged* in the declaration—that unless the proof of the amount corresponded exactly with the allegations in some of the counts, the plaintiff could not recover, although the amount found was less than the account specified in the several counts.

5. That the plaintiff could not recover on the common count, unless she had before action brought demanded the excess of fees.

These charges were refused, and the jury instructed that the indorsement of the execution by the defendant was not evidence that he had the slaves in his possession for any

length of time, or that he was entitled to any compensation for keeping them.

The defendant excepted to the refusal to charge as asked, and to the charges given.

Errors are assigned upon the judgment on the demurrer, the several rulings excepted to at the trial, and also that the court gave judgment upon a general verdict, ascertaining the plaintiff's damages at \$302 50.

RICE and CHILTON, for the plaintiff in error.

L. E. PARSONS, contra.

GOLDTHWAITE, J.—1. The question on the general demurrer is, whether the counts for the statute penalties are properly joined with the count for money had and received. The theory of joining different counts in the same declaration is, that they describe different causes of action—the practice is to multiply the counts, to avoid the consequences of failing upon a single statement of the cause of action, when upon some part of the entire case the plaintiff is entitled to relief. Pursuing the inquiry then, as if this plaintiff had distinct causes of action, the one by contract and the other by the statute, there seems no sufficient reason why he should not embrace them by one suit, if they can be classed in the same form of action. It has been held that debt for an amercement in a court leet, and on a *mutuatis* may be joined. [Bedford v. Alcock, 1 Wils. 248.] The rule is said to be, that when the same plea may be pleaded, and the same judgment must be, the counts may be joined, (2 Saund. 117c.) though the identity of the plea certainly does not constitute the test, as this would prevent the joinder of a count on a bill single, and one on a judgment or simple contract. Taking the rule however as stated, it covers this case, and the joining the counts is no error.

2. The objections to the counts on the statute resolve themselves into two—that the action of debt is not warranted by the act—and that the counts are not sufficiently specific if that action is proper. We shall examine each in its order. The statute provides that if any officer “shall demand and receive any other or higher fees” than prescribed,

“he shall be liable in damages to the party aggrieved for four fold the fees so unlawfully demanded and received, to be recovered before any court of competent jurisdiction.” [Dig. 238, § 9.] It is supposed the terms “in damages” indicate the legislative will that the action to recover the penalty shall be case instead of debt. The entire force of the term, as indicating the action on the case is lost, when the nature of the penalty is considered. It is as fixed and definite as terms can make it, and there is no discretion as to the sum to be recovered. This must be four fold the fees illegally demanded and received; hence it appears there is no reason growing out of the terms, which require an action on the case instead of debt. It is said in 6 Bacon’s Ab. 392, that if a penalty be given, but no action for the recovery, an action for debt will lie. This seems to furnish the general rule, and as there is nothing of sufficient force to indicate that another form of action was intended, that of debt seems entirely in accordance with principle.

3. The exception to the substance of the first three counts cannot prevail. The object of pleading is to advise the party what he is required to answer, and when; if this is sufficiently done, and a legal cause of action is exhibited, a declaration is good. Here, the counts substantially pursue the terms of the statute, as the defendant is charged with illegally demanding and receiving for fees higher and other recompense than that allowed by law, as well as specifying the aggregate sum so illegally received. This would be sufficient in an action for extortion, as the statement of the sum taken renders the allegation certain and specific. [Davy v. Baker, 4 Burr. 2471.] This statement of the sum taken seems necessary, in addition to the statutory definition of the offence, but is unnecessary to be proved precisely as alledged, as any sum illegally taken will sustain the count. [King v. Gillham, 6 Term, 265; Rex v. Burdett, 1 Ld. Raym. 149; 3 Chit. C. L. 293 n. w.]

4. The fact that a portion of the illegal fees were demanded on account of the former sheriff, and paid to him after their receipt by the defendant, is no defence to the action. The sheriff has no authority, without the mandate of the court, to collect fees due to a preceding sheriff; even if such fees are

legally due but not taxed, and certainly cannot be permitted to avoid the consequences of an illegal exaction by showing it was made for the benefit of another.

5. The refusal to give the 2d and 4th charges requested was proper for the reason previously stated, to wit, that although some sum is essential to be stated as illegally taken, under color of office; to give certainty to the indictment, yet it is not necessary to prove the sum precisely as laid. Proof that higher fees were received than the law allows, is equivalent to proof that *other* fees than the law allows were taken.

6. The return of the sheriff that he had taken slaves in execution, is no proof that they were kept by him for any specific time. It is unimportant here to say, what would be the force of a return stating the slaves had been kept, as that is not in the return in evidence. Neither is it necessary to enter on the question whether any fees can be collected on an alias execution, other than those taxed, or as commissions for executing it.

7. There is no pretence to say, that when money has been illegally exacted, the sufferer is required to make a demand before suing for money had and received.

8. The circumstance that the verdict of the jury is in damages instead of finding the sum as a debt, is one of no importance, according to our course of practice. [Malone v. Hathaway, 3 Stewart, 29; Sandford v. Richardson, 1 Ala. Rep. 182; Carrol v. Meeks, 3 Porter, 226.] If the verdict was for more than was proper, a motion for a new trial was the mode to correct the error. [Moore v. Coolidge, 1 Porter, 280.]

On the whole we can ascertain no error in the record.

Judgment affirmed.

BROWN v. TURNER.

1. A plea that a writ was not served as returned by the sheriff, is bad.
2. A bill drawn within, and payable within this State, nine months after sight, is payable nine months after it is presented for sight, and is entitled to days of grace.
3. Notice of the dishonor of a bill, payable on the 12th November, in Mobile, given on the 27th of the month to the drawer, in Washington county, is insufficient to charge him, unless some satisfactory excuse is made for such long delay.

Writ of Error to the Circuit Court of Washington.

ASSUMPSIT in the county court of Washington, by the defendant in error, as indorsee, against the plaintiff in error as drawer of a bill of exchange for \$1,000, on the 6th February, 1844, upon Austill, Marshall & Co., Mobile, payable nine months after sight, to David A. Love.

The declaration alleges the drawing of the bill, according to its tenor, its indorsement to the plaintiff, its acceptance by the drawees on the 9th February, 1844, its presentation to the agent of the acceptors for payment, they having dissolved their partnership, and being both absent from the city of Mobile, on the 12th November, 1844, and refusal by them, and protest for non-payment, "and that afterwards, to wit, on the 27th November, 1844, the defendant at his residence in Washington county, had notice of the protest aforesaid, by means whereof," &c.

The defendant pleaded in abatement, that the writ was not executed five days before the return day thereof, to which the plaintiff demurred, and the court sustained his demurrer. The defendant then demurred to the declaration, which being overruled, he pleaded over, non assumpsit and payment.

Upon the trial, as appears from a bill of exceptions, the defendant moved the court to charge, that if notice of protest

was not given to the defendant in five days after the bill was due, it was insufficient—and that in case sufficient notice was not given to the drawer, the plaintiff should have proven that there was no funds in the hands of the acceptors before this action could be sustained, which the court refused, and the defendant excepted, and charged the jury, that a party drawing a bill of exchange, became liable to the drawer on certain contingencies, the non-acceptance and non-payment of the same, and due notice given of the failure to accept or pay. That the jury must judge of the diligence used and whether, from the testimony, the drawer had proper, or due notice, if so, they must find for the plaintiff, if not for the defendant—to which the defendant excepted. Judgment was rendered for the plaintiff.

After the declaration was filed, an ancillary attachment was sued out, which was levied on some slaves.

The defendant prosecuted a writ of error to the circuit court of Washington, and assigned for error—

1. In sustaining the demurrer to the plea.
2. In overruling the demurrer to the declaration.
3. The record does not show whether the judgment is upon the writ, or attachment.
4. There is no declaration upon the attachment.
5. The matters arising upon the bill of exceptions.

The circuit court affirmed the judgment of the county court, which is the matter now assigned as error.

CHANDLER, for plaintiff in error.

LESLIE, contra.

ORMOND, J.—The plea that the process was not served was clearly bad. The court must of necessity give credence to the acts of its own officers, otherwise it would be impeded at every step by the trial of collateral issues. If any injury is thereby caused to the party, he must seek redress in another mode. [Crafts v. Dexter, 8 Ala. 769.]

The suing out of an ancillary attachment, whilst a cause is in progress, has no effect whatever on the suit then in progress, further than to provide the means of satisfying the judgment, if one is obtained.

It is objected that days of grace are not allowed upon such a bill as this, and that therefore the presentment for, and demand of payment were made too late. The act of 1828 provides, "that hereafter the remedy on bills of exchange, foreign and inland, and on promissory notes payable in bank, shall be governed by the rules of the law merchant, as to days of grace, protest and notice; and bills drawn and payable within this State, shall be deemed inland bills; and those drawn here and payable out of this State, shall be deemed foreign bills." [Dig. 383, § 11.] This then is an inland bill of exchange, payable nine months after sight, and it is well settled, that the time is to be computed from the date of its acceptance, or presentment for sight. [Campbell v. French, 6 Term, 200; Sturdy v. Henderson, 4 B. & A. 592.] It is equally clear, that such bills are entitled to days of grace. This bill being shown for sight, and accepted on the 9th February, 1844, fell due on the 9th November after, and adding the days of grace, it was properly presented for payment on the third day of grace, which was the 12th November, 1844.

It is further urged, that the averment in the declaration, of notice of the dishonor of the bill is insufficient, and we are of that opinion. The bill, as we have seen, was payable on the 12th November, and the averment of the declaration is, that notice was given to the drawer, at his residence, Washington county, on the 27th November. A notice of the fact of the dishonor of the bill, would have been sufficient if put in so the post office addressed to the drawer at his post office, the day after the refusal to pay the bill, or the first mail thereafter; but it is neither necessary or customary, when notice has been given, to state the facts. The usual averment is, that due notice was given of the dishonor of the bill, under which the proof may be made. [Firth v. Thrush, 8 B. & C. 387.] Here we infer from the allegation, that notice was given personally to the defendant, at his residence, which, if given in a reasonable time, would have been sufficient. But in our opinion, fifteen days is not a reasonable time, within which to give notice to a person in Washington county, of the dishonor of a bill in Mobile. If there had been any sufficient reason for this long delay, it should have

been averred in the declaration, or at least proved on the trial.

What is a reasonable time within which to give notice, is a question of law when the facts are detailed. [Darbishire v. Parker, 6 East, 3.] We know judicially, that Washington is the adjoining county to Mobile, and that therefore the interval which was suffered to elapse between the dishonor of the bill and the notice, was unreasonable. In the case last cited, it was held, that where there was a general post, notice by a special messenger, not communicated, until after the hour when it would have been received by the post, was insufficient. Whether this position would be true in any other case, than between two commercial places, we need not now consider. It is certainly true however, that when notice is necessary to be given, it is the duty of the party to give it in a reasonable time, and that cannot be considered reasonable which takes five or six times longer than the same information could be carried by the mail.

Without considering the first charge moved for, it is clear the court erred in refusing to instruct the jury, that if sufficient notice was not given, the plaintiff could not recover, without proving the drawer had no funds in the hands of the acceptor-

The judgment of the circuit court must be reversed, and the cause remanded, that it may be sent back to the county court, for further proceedings.

CALDWELL v. HARRISON.

1. Where several persons are deputed to represent another in some business transaction, such as the sale of property, &c., it seems that all of them should join in executing the authority; but the interest of the principal

as gathered from the words in which the power is conferred, may control the rule of interpretation. In respect, however, to public agencies, an authority executed by a majority will be held obligatory and a good execution.

2. An authority to commissioners to make the plan of a bridge across a stream at a place where a road passes, to contract for its erection, and to examine and report whether it is completed according to the plan, is *quasi* a public agency, and if the majority of them make the report contemplated, their action is quite as obligatory upon those concerned, as if it had received the sanction of all the commissioners.
3. Where a party subscribes a paper, stipulating to pay a certain sum of money, if a bridge (which was to be let out and built according to a plan to be adopted by certain commissioners,) should be completed by a day designated, and reported by the commissioners to be done and finished according to contract, to make his undertaking absolute, it should at least appear that the work was completed according to the contract, or so reported by a majority of the commissioners; and the mere indorsement on the contract signed by a majority, that the bridge had been received, is not sufficient, where it appears that the builder had not complied with his contract.

Writ of Error to the County Court of Butler.

THIS cause was instituted before a justice of the peace, and removed by appeal to the county court, where a judgment was rendered in favor of the plaintiff below. The case on which the court below acted, and now here for revision, is stated at length in the record, and may be thus condensed. A paper subscribed by the defendant, with the mark and figures indicating ten dollars placed opposite his name, was given in evidence. That paper, so far as material, is as follows: "We the subscribers promise to pay the amounts we have set opposite our names, for the purpose of building a bridge across Pigeon creek, where the old bridge fell in near Wm Mercer's, upon the following conditions, viz: Wm Wright, John Smith, Wm Mercer, Richard Williams, M. M. Weaver, and Daniel B. Shines are appointed commissioners, who are to make out a plan of said bridge, and are to let out the building of the same under said plan to the lowest bidder, and when said bridge is completed, and reported by said committee to be done and finished according to contract, then we

hereby bind ourselves to pay the amount subscribed as above stated : Provided the same is done by the 1st day of December, 1844." Which instrument of writing was signed by the defendant, with the amount of ten dollars set opposite his name in figures. Plaintiff further offered a writing, which set forth the plan of the bridge referred to, as prepared by all the commissioners, except Richard Williams (who never acted upon that or any subsequent occasion with the committee.)

The building of the bridge was publicly let out by the commissioners under the plan adopted by them, and the contract obtained by the plaintiff as the lowest bidder. A bridge was built by the plaintiff, at the place designated, but altogether different from the requirement of the plan, which the acting commissioners unanimously refused to receive ; but with the exception of Wm. Wright agreed, that, if the plaintiff would do certain specified work and make some alterations, and warrant the bridge should stand for a given number of years, then they would accept it. This proposition the plaintiff agreed to, and the commissioners separated.

On a subsequent day, a majority of commissioners signified to the plaintiff their willingness to receive the bridge, if certain additional work was done on it ; and pursuant thereto, the plaintiff performed such additional work by the first of December, 1844. An indorsement was made on the writing above set out, which is as follows : " We the commissioners have received the within named bridge ; (signed) John Smith, Madison Weaver, Daniel B. Shines, William Mercer." Smith was present, and assented to the same ; Weaver was not present, but told Smith to act for him, who accordingly had his name signed to the indorsement ; Shines was not present, but wrote to Smith to act for him, which he did, and caused his name to be subscribed ; Mercer was not present, but his name was signed by his authority ; Wright had been applied to, but refused his sanction to the proceeding.

The bridge thus received was materially variant from the plan under which the contract was made—all the witnesses examined, except the commissioner Smith, testified that the bridge was worth less than that undertaken by plaintiff to be

built. All with the exception noticed, stating it would be worth from ninety to one hundred and thirty, instead of one hundred and thirty-nine dollars and fifty cents, the price at which it was bid off, and would have been worth. The question is, has the condition on which the defendant undertook to pay his subscription been performed, and is he bound to pay the same.

T. J. JUDGE and N. COOK for the plaintiffs in error, cited Paley on Ag. 148-9-50, 164, 166, 303; Story on Ag. 115, 116, note 1, 10, 15, 136, 157, 165, 166; Chit. on Con. 567, 569, 570; 4 Ala. Rep. 340.

WATTS, for the defendant in error, cited Story on Ag. 14, 22, 45 note 4, 156, 157; 1 B. & P. Rep. 236; 6 Johns. R. 39; 3 T. Rep. 592; 6 Cow. Rep. 354; 4 Ala. Rep. 622.

COLLIER, C. J.—The contract sought to be enforced in this case, may be thus stated, viz: on condition that certain persons would, as commissioners, make out the plan of a bridge, and let out the building thereof, pursuant to the plan, the defendant below promised to pay ten dollars to defray the cost of its erection, when the same was completed and reported by the commissioners to be finished according to the stipulation of the undertaker; *Provided*, all this was done by the first day of December, 1844.

If a party depute several persons to represent him in some business transaction, such as the sale of property, &c. one of them cannot separately execute the authority. It has even been said that the rule upon this point is so strict, that an authority to three, *jointly* and *severally*, cannot be executed by two, but one or all must act; unless the intent of the principal, as gathered from all the words employed, is sufficiently clear to control the rule of interpretation. But this doctrine is only said to be true in relation to private agencies; for in public agencies an authority executed by a majority will be held obligatory, and a good execution of it. [See Story on Agency, 45, and note 4.] In the case before us, the authority conferred upon the commissioners to make the plan of a bridge, to contract for its execution, and to examine and re-

port whether it was completed according to the plan, was *quasi*, a public agency ; and if the majority of them made the report contemplated by the authority and contract, their action was quite as obligatory upon those concerned, as if it had been the transaction of all the commissioners.

But to make the defendant's promise absolute, and to charge him on his subscription, it is necessary that the bridge should be completed according to contract, or at least so reported by a majority of the commisrioners. We will not say that it should be both finished in that manner, and so reported to be, but certainly one fact or the other must be established ; for the defendant's promise is made upon one or both of these conditions.

The evidence showed that the bridge, which was in fact built, (when the additional work required by the commissioners was completed,) did not conform to the plan which they adopted, and according to which it was let out. And the testimony of all the witnesses but one, (who was a commissioner,) explicitly affirms that it was less valuable than the bridge undertaken to be erected by the plaintiff.

The indorsement on the contract, that the bridge has been received by the commissioners, if sustained by extrinsic proof that the plaintiff had performed his undertaking, would perhaps be a sufficient report within the contemplation of the parties. But in opposition to the evidence, it cannot be intended from the mere fact that the commissioners received it, that it was finished pursuant to the plan.

In cases in which the amount in controversy is as small as in the present, it has been said that the decision must be according to equity and good conscience. By this we are to understand, that the rules of strict law are not to be applied when these interfere to prevent a recovery, or exclude a defence which a court of equity would sustain. But if the condition on which the defendant promised to pay, has not been substantially performed, he is not liable.

The ruling of the circuit court is not supported by the evidence—its judgment is consequently reversed, and the cause remanded, if the defendant in error desires it.

MYER, ET AL. V. RIVES.

1. Where a guardian invests the funds of his ward in lands, and after the ward comes of age, a receipt in full of the personal estate is given, or a settlement made with the orphans' court, omitting to account for the funds thus invested, the receipt or settlement will be conclusive, unless impeached for fraud, mistake or want of knowledge.

Writ of Error to the Court of Chancery for the twelfth District.

THIS bill is filed by Myer and McQueen and wife against Rives. Its object is the settlement of the several estates of William Myer and Frederick Myer. The former died testate in South Carolina about the year 1820. By his will he left specific legacies to the children of Frederick Myer, his son, as well to those who should be born after his death as to those then living. His will contains a clause directing his executors to purchase lands for the benefit of his heirs. Frederick Myer assumed on himself the sole administration of this will, and removed with the property to the State of Alabama, where he died intestate, leaving nine children, of whom the complainants, Myer and Mrs. McQueen, are two. Rives was appointed his administrator, and was also appointed guardian of his infant children, amongst whom were the complainants last mentioned. Frederick Myer had purchased land in Alabama, and some time after his death, two of his children, of full age, being desirous that his landed estate should be divided or sold, an agreement was made between them and Rives, by which their shares of one ninth, were valued by commissioners appointed by the orphans' court, and the valuation paid them by Rives. The lands were then conveyed to the remaining minor children, and the two receiving the valuation, entered into a stipulation to refund to the minors the sum advanced by Rives upon their coming of age and refusing to ratify the purchase. This

arrangement seems to have had the sanction of the orphans' court, as there is an order for the appointment of commissioners to value the lands. Rives insists he was authorized to enter into this arrangement by virtue of the will of William Myer, as well as by his general authority as guardian. He also insists the arrangement was beneficial to the heirs, as well as warranted by the action of the orphans' court. He also insists that he has fully closed and settled his accounts, both as administrator and guardian, by reason of which settlements, the complainants are concluded. In addition to this, he exhibits the receipts of McQueen for a sum of money in full balance of the personal estate of Frederick Myer, deceased. The record of the orphans' court, showing a settlement by Rives as guardian of the complainant Myer, is also exhibited. The proof taken fully shows that the arrangement, when made, was more beneficial for the minor heirs than a division or sale of their portion would have been.

The chancellor dismissed the bill. This decree is now assigned as error.

J. D. F. WILLIAMS, for the plaintiffs in error, insisted—

1. That a power conferred on a trustee cannot be exercised either by his attorney or executor, unless the authority to do so is given by the instrument creating the trust. [2 Wms. on Ex'rs, 628; *Cole v. Wade*, 16 Vesey, 27; *Dayley v. At. Gen.* 4 Viner, 485; *Lucas v. Price*, 4 Ala. Rep. 679.]

2. If a trustee invests the trust fund improperly or without authority, he is liable. [Lewen on Trusts, 328; *Ringold v. Ringold*, 1 H. & G. 11; *Lupton v. White*, 15 Vesey, 432; *At. Gen. v. Fullerton*, 2 V. & B. 265; *Hart v. Teneyck*, 2 Johns. Ch. 118.] In all cases of doubt as to power, the trustee should apply to a court of equity. [Lewen on Trusts, 318; *Robb v. Thompson*, 1 A. K. M. 514.]

Cook, contra, insisted that a guardian or trustee under particular circumstances may purchase for his trustee or ward. [7 Am. Com. L. 175; *Ex parte Banks*, 1 Rawles, 266; 1 Johns. Ch. 27; 2 Story's Eq. § 1357.] Independent of the

fact that the purchase was beneficial and proper, the parties are concluded by their receipts and settlements.

GOLDTHWAITE, J.—We are not prepared to say there is no exception to the rule that guardians are not permitted to change the personal property of the ward into real estate, or *vice versa*. Indeed it seems to be conceded they may do so, under particular circumstances. [2 Story's Eq. § 1357.] But in the view we take of this subject, it is unimportant to decide this, or the question of authority under the will of William Myer. It is entirely evident that if this arrangement for the purchase of the slaves of the adult children on account of the infants would not be sustained by a court of equity, the funds paid out by the guardian either as such or in his capacity of administrator, remain as personal assets. In this connection, the settlement of the accounts by the defendant with the complainant Myer in the orphans' court, and the receipt in full on account of the personal estate given by McQueen is conclusive, as the statute expressly provides in relation to the first, that such settlements shall not be impeached except for fraud in obtaining the same, (Dig. 304, § 37,) and we apprehend the same consequences attach to a receipt given upon a settlement, when no advantage was taken and when the knowledge was mutual.

It is not pretended that the proof makes out any fraud, imposition, mistake or ignorance of facts; and hence we conclude the parties must be considered as waiving their strict right to an account of the sum invested on their account, even if that investment was not to be sustained on principle.

Decree affirmed.

LOVETT v. LOVETT.

1. Upon a divorce *a vinculo*, it is the duty of the chancellor to make a *division* of the estate of the parties. But the law does not require an equal division of the estate, but one graduated according to the nature of the case, considering the cause for which the divorce was granted, the party offending, the age of the parties, the estate to be divided, &c. &c.; but in all cases, if the estate of the husband is sufficient, the wife is entitled to a maintenance.
2. Where the personal estate of the husband, consisting principally of slaves, was valued at \$13,685, and his real estate at \$1800, the cause of divorce being the abandonment of the husband by the wife, the parties having but two grown children provided for, the estate having been accumulated by the industry of both parties, and they being advanced in life—*Held*, that one third part of the personal estate absolutely, and the use of one third part of the land for life, appeared to be a just exercise of the legal discretion vested in the chancellor.
3. The proper course in such a case is, after the decree has been pronounced, for the divorced party to file an allegation of faculties, setting out the estate of the husband, which he is required to answer, after which, if necessary, proof may be adduced. But where the court, on motion and petition of the wife, referred the matter to the master to inquire and report the estate of the husband, before whom the husband appeared, held, that it was too late to raise the objection.

Error to the Chancery Court at Monroeville.

THE plaintiff in error filed his bill, and obtained a decree divorcing him from his wife, because of her voluntary abandonment of him.

In her answer, the wife suggested that the complainant was the owner of a number of slaves, and other property, and that she was destitute of the means of support in her old age, and by her counsel moved the court for a division of the estate, that she might no longer be dependant on the friendship and charity of others for a support. Thereupon the chancellor made a reference to the master, to take an account of the personal estate of the complainant, the value

thereof, and average value of his income, and what portion thereof ought to be set apart and vested in the defendant, for her maintenance and support. Or whether it would be more suitable and advantageous to her, to be paid annually a sum of money, instead of receiving a portion of the estate.

She also filed a petition, particularly describing the estate of the complainant, and claiming alimony, praying a *ne exeat*, &c.

The master made his report, in which he estimated the personal property of the complainant at the value of \$13,685 and his real estate at 1,800

\$15,845

That his annual nett income was \$950. That if it was considered proper to set apart a portion of the property for her use, six good field hands would be a suitable proportion, but he considered it more advantageous to her to receive \$400 in money annually.

The defendant excepted to this report—

1. Because it was not in accordance with law, equity, or the evidence.

2. Because the annuity is not equivalent to an equal portion of the estate, nor as suitable or advantageous for the defendant.

3. Because six negroes is neither a lawful or equitable proportion of the estate, there being but one son, and he settled for life.

4. Because the master has merely allowed alimony for life, when the decree is a divorce from the bonds of matrimony.

The complainant also excepted to the report of the master.

Upon the coming in of the report, the complainant moved to dismiss the proceedings, because the answer laid no ground for it, and because there was no petition upon which it could be sustained.

The chancellor refused to dismiss, though he considered it would have been more formal if the defendant had filed her petition, as the ground of proceeding. Yet as the complainant was cited to appear, and did appear, and examine the

witnesses, he declined to dismiss. He further proceeded, and decreed, that as it appeared the complainant had two children, the defendant was entitled in analogy to dower, to one third part of the personal estate absolutely, deducting from the value of the personal estate \$1106 debts due by him. That she was entitled to the use of one third part of the land during her life, and if it could not be divided, an equivalent in money. He appointed commissioners to carry the decree into effect, leaving the complainant in possession of the dwelling house and adjacent lands.

From this decree the complainant prosecutes this writ, and assigns for error the decree of the chancellor.

HOPKINS, for plaintiff in error.—In England the ecclesiastical courts can grant divorces from bed and board only, even for abandonment or adultery. Upon proceedings for a divorce, at the suit of the husband, for the fault of the wife or her crime, the court would make an allowance against the husband for her support pending the suit. But if the divorce were granted to the husband, no decree could be made against him for an allowance for her support after the divorce. It was otherwise if she obtained the divorce. She would in such event be entitled also to a decree against him for a suitable allowance for her support. [13 Law Lib., Poynter on Mar. & Div. 85, 86; 33 Ib., Shelford on Div. 346, 348, 350.]

Where a wife abandons her husband, she is not entitled to alimony, during her desertion of him, even in a case where he acquired his estate by the marriage with her. [Same book, 85, note B.] *For the same reason he is not liable for her support after a decree of divorce for the abandonment.* At common law he is not liable for necessities furnished his wife without his assent. [Clancy's Rights of Mar. Women, 23.] But a court of equity can compel him to furnish necessities to an obedient wife. [Ib. 23.] But no court can charge him with necessities furnished her after she has abandoned him. [Ib. 33; 3 Esp. Rep. 256; 2 Black. Rep. 10, 80.]

Divorces *a vinculo* may be decreed in this State for abandonment, adultery, and many other causes. The authority

given to a court of chancery, when it decrees a divorce, to decree also a division of the estate of the parties, intended only to authorize the court to make a decree in favor of the injured parties, as is done in England, upon decrees *a mensa et thoro*, upon such decrees as the latter here, there would be authority to decree alimony to the injured party, independent of the statute, but as divorces *a vinculo* are not granted in England, by any court, there is no principle in the laws of that country, which authorized any allowance of alimony upon a decree *a vinculo*. Hence the enactment was merely intended to authorize courts, upon decrees of divorce *a vinculo*, to provide for the injured party. Surely, where the husband is divorced upon the ground of abandonment, or adultery, either it was never intended that he should be decreed to furnish the woman with a support, after the divorce, or that a woman owning a separate estate, and her husband nothing, divorced from her husband, for abandonment, and adultery; should have a part of her estate vested by decree in her husband, as his property, after the divorce for his crime. [Ib. 88, note, N.]

In no case would there be any authority to decree allowance against the husband, without an allegation of faculties, or as similar proceedings filed by the wife, to which he might have an opportunity of answering. [Ib. 86; 33 Law Lib. 347.]

It was not right to allow the wife any thing in this case, and the discretion of the chancellor may be reviewed by the appellate court. [Ib. 90, note, U; Holmes v. Holmes, 33 Law Lib. 250.] If the court had authority to make an allowance, it ought not to exceed one-fourth part of the personal property, as the husband and wife have two children. The court had no power over the real estate of the husband, which is protected in every case by the statute. [Clay's D. 170, § 8; 33 Law Lib. 351.] Yet the decree compelled Lovett to divest himself of a title to one-third of his real estate for the life of a third person. It has carved a freehold out of one-third of his estate, and vested the title to it in a third person. If Lovett, the husband, should die before his wife, the seizin of this third would not, either in deed or in law, descend upon his heirs; if they died before Mrs. Lovett,

their wives would not be entitled to dower in this third. [Co. Litt. title Dower, ch. 5, § 36, and commentary under the head of Seizin.]

The right to decree alimony, is incident to the power of granting divorces. [33 Law. Lib. 354.]

PECK, contra.

ORMOND, J.—The act authorizing the court of chancery to dissolve the bonds of matrimony, requires the court pronouncing the decree, “to order and decree a division of the estate of the parties, in such way as to them shall seem just, and right, having due regard to the right of each party, and their children, if any. Provided, however, that nothing herein contained shall be construed, to compel either party to divest him, or herself of the title to real estate.” [Clay’s Dig. 179, §. 8.] We are now called on for the first time, to construe this law, and we approach the subject with a thorough conviction of the magnitude of the question, and the difficulties surrounding it.

The counsel for the plaintiff in error, has earnestly insisted, that it is impossible to suppose, the legislature intended that a division of the property of the husband should be made between him and his divorced wife, when she has been the guilty cause of the separation; and he has referred us to the canon law of England, to show, that alimony is never allowed the wife, after a decree *a mensa et thoro*, when she is the offending party, and that the act must be understood to apply to those cases where the husband, and not the wife is the cause of the divorce.

There are insurmountable difficulties in the way of this interpretation of the law. It declares in plain, and unambiguous language, that “the court shall decree and order a *division* of the estate of the parties.” It was not alimony that was to be allowed the wife. Alimony, is an allowance paid by the husband out of his income, pending a suit for divorce, or after a decree of divorce during the period of their separation, upon a decree *a mensa et thoro*. The divorce contemplated by this statute, is *a vinculo matrimonii*, and was therefore intended for a permanent provision for the wife.

This is evident from the nature of the thing, as well as from the language employed. It is to be a *division* of the estate; language which could not have been employed, if a portion of the husband's income only was to be appropriated to the use of the wife during her life. It is not only a division of the estate, but it is a division of the estate of the *parties*, and that this applies to the estate of the wife, as well as the husband, is placed beyond all doubt by the proviso, that neither party shall be compelled to divest him, or *herself*, of the title to real estate. It is therefore manifest that it was an actual division of the estate, held by either husband or wife, or by both jointly, which was designed by the legislature, and not an allowance for maintenance, out of the income of the husband.

The law being clear, and unambiguous in its terms, the argument against its expediency is entitled to but little, if any consideration. But is it clear that an enlightened policy would not justify the making a permanent provision for the wife, even where she has been divorced for adultery. It must always in such cases be difficult, if not impossible to trace the causes which, step by step, led to the commission of the crime. Slighted affection, unkindness and neglect on the part of the husband, may be, and frequently are the remote, if not the proximate causes, which lead to the violation of the marriage vow; and although the wife be guilty, the husband is not entirely guiltless. These causes, where they exist, certainly constitute no justification for the wife, but do they not, in some degree, palliate her offence? Independent however of all such considerations, the public at large has an interest, that the offender shall not become an outcast upon society, cut off from the common charities of life, without the means of support, and thus tempted to continue in the commission of vice.

The act, it is true, uses the term *division of the estate*, but it does not, as the argument of counsel supposes, require the court to make an *equal* division of the property, and thus by giving to the divorced wife greater rights in the property of her husband, than she would have had had she been faithful to him, offer a premium for the commission of crime. The act directs the division to be made *in such way as to the*

court shall seem just and right, having due regard to the rights of each party, and their children, if any. Here is a large discretion invested in the court, by which the division of the estate may be graduated, according to the nature of the cause for which the divorce was granted—the party offending—the condition and age of the parties—the estate of the husband, and the manner in which it was acquired; whether derived principally from the wife, by their joint exertions, or by the husband's alone—the condition of the family, and the children still depending upon the husband for maintenance, and establishment in life. All these, and other considerations, will necessarily enter into the sound legal discretion of the court, in making the division.

It can admit of no doubt, that the share assigned to the wife of her husband's estate, should be greater when the divorce is obtained by her for his misconduct, than when she is herself the delinquent. In the first case supposed, the wife being cut off from the society of her husband, and from all the comforts of wedded life, without any fault on her part, should be placed by the court in as good a condition, as the nature of the case will admit. The English ecclesiastical courts, go so far in some cases, as to allow the wife one-half the income of the joint estates of the husband and wife. [Cooke v. Cooke, 2 Phil. 40.]

We need not consider this aspect of the case further, as the question before us, is the portion of the wife when she is the delinquent. The adjudged English cases afford no aid in this investigation, as alimony is not allowed to the wife by the canon law, after the divorce, when she is the offending party. Our statute, as we have seen, introduced a new rule, and provided, that in such cases a division of the estate should be made. But in our opinion, a proper regard to public morals requires, as well as the manifest design and purpose of the statute, that the division should be graduated by the quality of the offence, and shall purposely omit all consideration of the manner of the division where the wife has a separate estate, as that fact does not exist in this case.

We are clear in the opinion, that no construction can be put upon the statute, which would authorize the court in any

case, to do less than provide a maintenance for the wife, if the estate of the husband is sufficient for that purpose. We use the term maintenance, in preference to subsistence, because we think the statute evidently contemplated something beyond a mere support. She should be enabled, if her husband's estate was such as to justify it, to live in such a manner, as if possible to enable her to regain her lost standing in society.

The defendant in this case was not an adulteress. Her offence is the abandonment of her husband. This is doubtless a high offence against the marriage relation, but neither in itself, nor in its consequences, so great as the crime of adultery. The chancellor allowed her one-third part of the husband's personal estate, deducting a sufficiency for the payment of his debts, and the use of one-third part of his land during her life, securing to him the use of the mansion, and the grounds adjacent.

We cannot say that this was an improper exercise of the discretion of the chancellor. The parties appear to be in the middle rank in life, as his estate, real and personal, is valued at \$15,485. They are now in the decline of life, with grown children, who it seems are settled, and we infer from the report of the master, that the estate has been created by the economy and industry of the husband and wife. Considering the age of these parties, the cause of divorce, and the amount of the estate, we are not prepared to say, that the chancellor has not kept within the bounds of legal discretion, in the division of the estate.

It is further contended that the decree, by vesting in the wife a life estate in one-third part of the lands, has divested the husband of his title. In our judgment the law evidently contemplated a division of land. It directs the court to make a division of the *estate* of the parties. The term estate, is certainly comprehensive enough to include lands, and indeed it might be the only estate the parties possessed. The limitation in the proviso strengthens, instead of impairing this conclusion. The prohibition, that neither party shall be compelled to divest him or herself of the *title* to real estate, in connection with the section to which it is added, shows that some interest was intended to be made, susceptible of

division, and this is satisfied by giving the use, and permitting the fee to remain in the owner. If it had been intended to prohibit the division of real estate, instead of this proviso, the term personal would have been prefixed to the word estate.

The mode of proceeding in the ecclesiastical courts to obtain alimony, is by an "allegation of faculties," as it is called, on the part of the wife, setting out the estate of the husband, which he is required to answer, and which, as it is the income of the husband, is generally conclusive on the wife, but which she may in some cases, contradict by proof. [Shelford on Marriage and Divorce, 586.] This allegation is made whilst the suit is in progress, for alimony pending the suit, or after the decree is pronounced, for a permanent allowance.

The course pursued in this case was merely by motion to the court, upon which the court directed a reference to the master, to ascertain the estate of the husband. The husband appeared before the master, and contested his right. It would certainly have been more regular for the wife, after the decree was passed, to have filed her petition, setting forth the estate of her late husband, and his answer thereto would in all probability have dispensed with the necessity of a reference. But we think it was too late to raise the objection, after the appearance before the master, as every thing was accomplished which would have been if a petition had been filed.

The decree of the chancellor must be affirmed.

GARY, ET AL. V. THE BANK OF THE STATE OF ALABAMA.

1. Where a notice is given that a motion will be made for judgment on a particular day of the term, if the motion is not then submitted, the notice

Gary, et al. v. The Bank of the State.

will perhaps be discontinued; but if it is afterwards made, and continued at the defendant's instance, the latter cannot object to the irregularity.

2. Where a *fieri facias* issued on a joint judgment against the principal and his security, is returned unsatisfied, it is no answer to a suggestion by the plaintiff, that the sheriff could with due diligence have made the money thereon, that the surety paid the execution in part, upon an agreement with the plaintiff that the latter should proceed against the sheriff and his sureties for the neglect of the latter to make the money of the principal, before the surety should be looked to for the payment of the residue. But it seems the recovery upon the suggestion should not exceed the balance of the *fi. fa.* unpaid, with damages and costs.

Writ of Error to the Circuit Court of Tuscaloosa.

THIS was a proceeding under the statute of 1326, at the suit of the defendant in error suggesting that the plaintiff, Gary, could with due diligence have made the money on a writ of *fieri facias* in favor of the bank against J. B. Bunn, and S. D. Hooks, which was placed in his hands as the sheriff of Sumter county. Pursuant to a notice, a motion was made against the sheriff and the sureties, in his official bond, for judgment, founded upon the default suggested. An issue being made up, the cause was submitted to a jury, who returned a verdict for the plaintiff below, and judgment rendered accordingly.

On the trial, the defendants excepted to the ruling of the court. The bill of exceptions presents the following points: 1. The notice was issued in December, 1844, informing the defendants that the motion would be made on the first day of the March term of the circuit court holden in 1845, but the same was not submitted until the 12th day of that term, when it was then made and continued by the plaintiff. On the trial docket of the succeeding term, there is the following memorandum: "Cont'd by defendants, Sept. term, 1845;" and this was held sufficient to authorize the court to take jurisdiction of the cause, notwithstanding an objection by the defendants. 2. After the evidence on the part of the plaintiff was closed, the defendants introduced the cashier as a witness, who testified, that after the return of the execution in February, 1844, as well as he recollected, Hooks, one of the defendants in execution, and the security of Bunn, proposed to

the bank to pay one half the judgment, that time should be given him for the remainder, and he permitted to institute a proceeding like the present against the sheriff and his sureties, in the name of the bank, for his use and benefit. The bank acceded to this proposition, but in a short time, perhaps the same day, the directory being informed that the debt was classed among the bad and doubtful debts, and was in the hands of the agents and attorneys of the bank for collection and settlement, withdrew their assent to the proposition, and referred the matter to the agents and attorneys. It was proved, that it was the practice of the attorney for the bank, whenever informed that a default existed, to institute rules, without consulting the directory. There was no evidence that the attorney knew of any agreement between the bank and Hooks, that this proceeding was carried on for the benefit of the latter, or that the bank was to hold him accountable for costs in the event of a failure to prosecute the same with effect. It was admitted that Hooks had been active in the prosecution of this motion, and that upon his information the attorney for the bank had acted. The defendants further proved, that one of the agents and attorneys for the bank, in July, 1845, paid on the judgment against Burn and Hooks the sum of \$320, which he had received from Hooks about one year previously. The defendants then proposed to prove the declarations of the agent, &c. who thus paid the money, made at the time of the payment, "to show that this motion was made in the name of the bank, for the use and benefit of Hooks; but the plaintiff objected to their admission, and the objection was sustained.

E. W. PECK & L. CLARK, for the plaintiff in error, made the following points: 1. The court should have refused to take jurisdiction of the motion, because the notice informed the plaintiffs that a motion would be made on the first day of a term, when in fact it was not made during the term, but on the 12th and last day of the term it was merely docketed and continued by the bank. [Broughton v. The Bank, 6 Porter, 48; Crawford v. Planters & Merchants' Bank, 4 Ala. Rep. N. S. 313.]

2. The declarations of Jones should have been admitted.

He was the agent and attorney of the bank, to whom this very matter had been refused by the bank, the declarations were made by the agent, touching the business referred to him, and while acting in the premises; they were therefore a part of the *res gesta*, and binding upon the bank, especially as the bank, being a mere artificial body, could only act through the instrumentality of agents. [1 Greenl. Ev. § 113, p. 125; Story on Agency, § 138, p. 130.]

P. MARTIN, for the defendant in error. The notice of the motion was regularly given, and continued. But if this be not so, the appearance and plea waives all objection to the jurisdiction of the court. [Clay's Dig. 218, § 85; 1 Porter's Rep. 22; 8 Id. 442; 1 Ala. Rep. 137, 207.] The declarations of the agent and attorney of the bank were incompetent evidence—he being a good witness. [1 S. & P. Rep. 449; 4 Ala. Rep. 710.] There can be no objection to the judgment—it is rendered upon a verdict which affirms the truth of the suggestion. [4 Ala. R. 296.]

COLLIER, C. J.—Conceding, that where parties to be affected, are informed by a notice that a motion will be made on a particular day of a term for judgment against them, it is necessary to submit the motion on that day, or the notice will cease to be available; yet it does not become so wholly inoperative that a motion afterwards made cannot, *under any circumstances*, be entertained. Here, it appears from a note made on the trial docket for the term next after the return of the notice, and after the motion had been submitted that the cause was continued by the defendants. This note was quite sufficient to have authorized an entry *nunc pro tunc* upon the minutes, if necessary, and may be considered as having been formally made. The continuance of a cause at the instance of a party, presupposes, or at least admits its pendency in court, and will estop him afterwards insisting that it had been previously discontinued.

We will not stop to inquire whether the declarations of the agent of the Bank are so connected with the receipt and payment of the money as to constitute a part of the *res gesta*: for conceding their truth, they furnish no answer to the

suit by the bank. It must be borne in mind that Hooks, though a defendant in the same execution, was the surety of Bunn, and therefore interested in its collection from his principal's estate. Upon its return unsatisfied, his liability continued, and there was nothing unnatural in endeavoring to make such terms with the bank as would relieve himself as much as possible. Certainly he might stipulate for the immediate payment of a part by himself, and that the bank should proceed against the sheriff and his sureties for the default in not making the money. It may be that the sheriff might show the payment by Hooks and *pro tanto* diminish the recovery against him; but certainly such an agreement could not impair the right of the bank to charge him for the residue.—Thus far at least the judgment would remain unsatisfied, and the remedy for the official default as available as when the *fi. fa.* was returned.

It is immaterial whether the proceeding was instituted at the suggestion of Hooks or not—it is in the name of the bank, commenced and prosecuted by its attorney, and whether in its initiation the directory had any agency, is immaterial—they have adopted it, and that is quite sufficient. There is nothing in the record but the notice and suggestion that indicates that the plaintiff sought to recover the full amount of the execution, and the judgment rendered for less than half, with damages according to the statute. There is no error in the ruling of the circuit court, and its judgment is consequently affirmed.

BILLINGSLEY v. HARRELL.

1. Where a debtor in the first instance gives a mortgage on slaves, to secure his creditor, and the creditor afterwards takes from him another mortgage on the same and other property, extending the law day, and securing other creditors, the acceptance of the last mortgage creates an im-

plied contract not to proceed on the first, and therefore the possession held by the creditor, of slaves purchased at a sale under the first mortgage is not adverse, so as to render a sale by the trustee under the second mortgage void on account of an adverse possession. The title of the creditor acquired by his purchase, is subordinate to the last mortgage.

Writ of Error to the Circuit Court of Perry.

DETINUE, by Billingsley against Harrell, to recover certain slaves.

At the trial the plaintiff read in evidence a deed under date of 17th September, 1840, executed by John Huntington of the first part, William Howell of the second part, and the defendant of the third part. This, after reciting that Huntington is indebted to Harrell, by four promissory notes, the first for \$1740, dated 12th July, 1839, due one day after date, to Frederic Becton, and by him assigned 20th March, 1840, to Harrell, without recourse ; the second for \$120, dated and due 19th February, 1840 ; the third for \$124 27, dated and due the 29th April, 1840 ; and the fourth for \$705, dated 16th September, 1840, and due 1st January next thereafter. And after the further recital that the plaintiff Billingsley, and one Parish, are the securities for Huntington, on three several notes, payable to the Branch of the Bank of the State of Alabama at Mobile, the dates and sums not recollected, but the three amounting to \$2,000, proceeds with the declaration that Huntington is desirous to secure Harrell in the payment of the sums due to him, and to save Billingsley and Parish harmless on account of their liabilities, then conveys to Howell certain described lots of land in the town of Marion, and certain slaves then named and described, upon the following condition, i. e., should Huntington fail to pay off and discharge the debt to the said Harrell and to the said bank by the 1st January, 1841, then and in that event the said Howell, so soon thereafter as the said Harrell, or the said Billingslea and Parish should direct, should take the property described, both real and personal, and, after a certain notice, expose the same to sale for cash, and out of the proceeds of such

sale first to pay Harrell whatever sum should remain due to him, and then to pay the said bank the sum remaining due to it, or to pay Billingsley or Parish such sums as either should have paid the bank.

The deed provides for Huntington's possession until the expiration of the time limited, and for its avoidance if the debts are paid by him. The plaintiff then proved by Huntington that he in July, 1839, became indebted to one Becton by note in the sum of \$1740. At the time of receiving the money for which this note was given, Huntington executed to Becton a bill of sale or mortgage, dated 12th July, 1839, conveying to him the same slaves as were afterwards conveyed in the deed to Harrell before stated. At the foot of this instrument is the following memorandum or agreement. The condition of the above bill of sale is as follows: "I have borrowed and received from Frederic Becton \$1740, for which amount said Becton has John Huntington's note, for which I have given the above bill of sale, which is deposited with George Hodge, and if the same be not paid to said Becton on application at Marion on the 1st January, 1840, then the said Becton is to cause the said Hodge to have sold at auction the above named slaves, or so many as will pay the above specified amount of \$1740." This, as well as the bill of sale, was signed by Huntington. The witness further stated, that in November of the same year Becton returned this bill of sale and drew another in its stead, but substantially similar. When the note became due the witness was not prepared to pay it, and proposed to the defendant to advance the money to Becton and take up the note, and to take the bill of sale which Becton held, as a security, and assume Becton's place. This was agreed to, and the defendant, in March, 1840, paid the sum to Becton and took from him a transfer of the note and bill of sale. The witness further stated he executed the deed of the 17th September, 1840, at the instance of the defendant, under the following circumstances: The defendant came to him shortly before the execution of that deed, and said he considered the slaves conveyed in the bill of sale to Becton assigned to him as not sufficient to pay the debt and accumulated interest, and desired the witness should give further security by executing a deed

of trust on his house and lot. Witness agreed to do this, provided the plaintiff and Parish, who were indorsers for him in bank, should be embraced in the deed. The defendant consented, and the deed before stated was then executed. The three smaller notes set forth in this deed, except that for \$120, were given for interest which had accumulated, or would so accumulate by the 1st January, 1841. They were founded on the interest growing out of the \$1740 note, originally given to Becton. At the time of the execution of this deed, there was no understanding or agreement between its parties as to what was to be its effect on the bill of sale previously made to Becton. After the witness had made the deed, he informed the plaintiff and Parish that he had secured them in a deed of trust with the defendant. They both assented, and said they were satisfied. The bill of sale to Becton, which with the note was assigned to the defendant, was left in his possession when the witness left Alabama in 1843, and since that time he knew nothing of it. To the best of the witness' recollection, the defendant sold the slaves under the Becton bill of sale in December, 1844—[Most probably a clerical error for 1842.] The sale was made in Marion—they were put up to sale at the request of the defendant, who became the purchaser. The witness was not present at the sale. The slaves went into the possession of the defendant, and were in his possession when witness left the State in January, 1843.

The plaintiff then put in evidence a deed made by the defendant and William Howell, dated 12th March, 1841, which recites that Huntington was desirous of conveying to one Foster his house and lot, (the same conveyed by the trust deed,) and also that they had received satisfaction to the extent of the value of the same, and for the further consideration of one dollar, they thereby forever quit claimed, abandoned and gave up to the said Huntington, all right, title, claim or interest of any and every kind whatever, and consented to the aforesaid sale, or any other disposition the said Huntington should see proper to make. This deed was acknowledged before the clerk of the county court.

The plaintiff then proved by a witness that he as the agent for Foster bought the house and lot in Marion for the sum of

\$3000—\$2500 in cash, and \$500 on a credit until the first January. The settlement or payment of the purchase money was made in the office of defendant, but the witness did not remember whether the defendant was present. \$1500 was counted and laid on the table, and \$1000 was paid by one Cawthorn, as he said, to defendant. The witness could not tell who took up the money, but the note was made to Huntington for the other \$500.

The plaintiff then proved his payment to the bank at Mobile by the substitution of his own paper and cash, of the notes for which he and Parish were sureties for Huntington, amounting to about \$2500. It was also in proof that Huntington was altogether insolvent, and had removed from the State.

The plaintiff further proved that Howell, the trustee in the deed of trust, duly advertised the slaves under the terms of that deed. The slaves were not present, but in the possession of the defendant, who forbade the sale. The plaintiff became the purchaser of the three slaves now sued for, and received a bill of sale from the trustee.

The defendant then proved the execution of the bill of sale from Huntington to Becton before spoken of, which is the same as previously set out, except that one Buckley is named instead of Hodge to make the sale. This was duly recorded in the clerk's office, 9th December, 1839.

He then proved a sale of the said slaves by Buckley, and the execution of a bill of sale from him to defendant, dated 5th December, 1842.

On this state of proof the plaintiff requested the court to charge the jury—

1. That the deed of trust, in so far as it is embraced in the bill of sale or mortgage to Becton, was inconsistent with and repugnant to that, and operated in law as a surrender of the same. This was refused.

2. The court charged the jury, that if at the time of the sale by the trustee of the slaves to plaintiff, the defendant was in possession under his previous purchase under the Becton bill of sale, claiming them under the sale in good faith, then his possession was adverse, and the sale by Howell to the plaintiff was void.

3. The plaintiff insisted the defendant was to be charged with the price of the lots, &c. sold to Foster, and that this was sufficient to pay the debt secured to him by the Becton bill of sale; that this sale operated as a satisfaction of that bill of sale, and therefore the sale to the defendant under that was void, and the possession thereby acquired by the defendant was not adverse to the title of the trustee in the deed of trust, and so requested the court to charge. This was refused, but the court instructed the jury the defendant was to be charged with \$2500 on that account, and if this sum was sufficient to pay the debts secured by the Becton mortgage, the same would be satisfied, yet if the defendant did not actually receive that sum, and believed he had the right to have said slaves sold under the Becton bill of sale, and that sale was made in good faith, the defendant being the purchaser, and that if he was thus in possession at the time of the sale to the plaintiff, then his possession was adverse to the title of the trustee, and the sale by him was void.

The plaintiff excepted to the refusal to give the charges requested, and to the charges given. The several rulings of the court in this particular, are assigned as error.

GARROTT, PECK, and PHELAN, for the plaintiff in error, insisted—

1. That the acceptance by Harrell of the deed of trust securing Billingsley and Parish as well as himself, operated as a surrender of the title under the Becton bill of sale. [Roberts on Frauds, 254 to 260; 7 Com. Dig. 384-5; 20 Viner's Ab. 127-8; F. Van Rensselaer v. Penniman, 6 Wend. 569.]

2. It also operated as a release of the previous title under the bill of sale in consequence of the covenants of Harrell. [Cuyler v. Cuyler, 2 Johns. Rep. 186; Phelps v. Johnson, 8 Johns. Rep. 54; Powell v. Forest, 2 Saund. 48; 5 Bacon's Ab. 683; Hastings v. Dickinson, 7 Mass. 153; Sewall v. Sparrow, 16 Johns. 34; 6 Call, 308.]

3. Harrell is also estopped by the deed accepted by him from asserting a different or paramount title. [Steel v. Brown, 1 Taunt. 381; Tarrant v. Terry, 1 Bay's Rep. 239; Dinn v. Carroll, 3 Johns. Ca. 174; Jackson v. Harbrook, 3 Johns. 331; Springsteer v. Schemerhorn, 12 Ib. 357; Fitch

v. Baldwin, 17 Ib. 161; 4 Comyn's Dig. 198-9; 201, note m.]

4. In all these views, the title now set up by Harrell is a subordinate one, and his possession not adverse. [Foster v. Goree, 5 Ala. Rep. 424.]

A. GRAHAM, of Perry, contra, argued—

1. The deed of trust was merely an additional security, as the object was to benefit Harrell, [6 East, 104; Cro. Jas. 176,] and the Becton deed was not delivered up. The lien of that deed might be quite important, and certainly was never relinquished. [Cro. Jas. 176; Viner's Ab. tit. lien; Roberts on Frauds, 259.] Besides, the question of intention is one of fact.

2. The doctrine of surrender has no application to personal property. [1 Shep. Touch. 306.]

3. The defendant insists his title was complete; but if only colorable, and his possession *bona fide* adverse to that of the plaintiff, the sale was void. [Goodwin v. Lloyd, 8 Por. 239; Brown v. Lipscomb, 9 Ib. 472; Dunklin v. Wilkins, 5 Ala. Rep. 199.] The distinction between this and the case of Foster v. Goree, 5 Ala. 424, is that here the party claims by a *former* and paramount title, while there it was one derived from the same source as the trust deed, and *subsequent* to it.

GOLDTHWAITE, J.—The principal question here is as to the effect, between these parties, of the second mortgage upon the one first executed by Huntington. In the aspect in which the case is presented, we deem it unimportant to inquire whether the first mortgage might not be set up to protect the property against a subsequently acquired lien, because if that effect is conceded, it does not follow the present defendant may assert a title under it as against that arising out of the one afterwards executed and accepted by him. It seems to us that the legitimate inference from the facts stated is, that the defendant waived all his rights under the first mortgage, and consented to look for his security alone to the second. There are many instances in which the law will carry out the manifest intention of the parties, by giving to deeds an effect different from that the mere terms will ordinarily indi-

cate, and a party is frequently estopped by his own acts from asserting a title which otherwise would prevail. Thus a release to one of several joint obligees may be pleaded in bar by all, and a covenant not to sue is sometimes construed to be a release. [2 Saund. 48, a.] So the acceptance by a tenant of a new lease of the same premises during the continuance of a former lease, has been deemed a virtual surrender of the first, when such a presumption arose from the acts of the parties. [Van Rensselaer v. Penniman, 6 Wend. 569.] And where one had accepted a deed from another, it has been held he is estopped from asserting title in himself to show a breach of the grantor's covenant of seizin. [Fitch v. Baldwin, 17 Johns. 161.] In the present case it will be seen both mortgages secure the same debts to the defendant, who by the terms of the first was at liberty to sell the slaves after January, 1840. By the terms of the last, the law day is fixed one year later. It cannot be supposed the law would permit the party, after impliedly if not expressly stipulating that the mortgagor should retain the slaves until the later period by joining in and thus accepting the deed, to proceed under the former mortgage. And if in this respect that is set aside, there is precisely the same reason to prevent the trustee therein named from acting, to wit, that the parties have stipulated for the action of another trustee.

It follows as the necessary result of these views of the effect, as between these parties, of the acceptance of the second mortgage, that it must be considered as superseding the first, and the defendant is really holding the slaves under a title which in point of law is subordinate to that under which the plaintiff claims. This being established, the principle settled in *Foster v. Goree*, 5 Ala. Rep. 424, as well as *Echols v. Derrick*, 2 Stewt. 144, is entirely applicable, and controls the case.

In our judgment the court erred in charging that the possession of the defendant was adverse to the title purchased by the plaintiff, and the sale for that reason void.

Judgment reversed and cause remanded.

FITZPATRICK v. HANRICK, ET ALS.

1. A covenant by H. and two others, his sureties, to convey to F. "a half section of land, situate in Macon county, worth \$500, on a patent issued to William Walker, or to Edward Hanrick, as executor of Wm. Walker's estate, to the N. $\frac{1}{2}$, 31, 15, 23, situate in Macon county, Alabama," is an undertaking to convey the particular tract, or a half section of land in Macon county, worth \$500, as soon as a patent issued for the particular tract mentioned in the covenant.
2. As the time when the patent would issue was uncertain, and more within the knowledge of the obligors than the obligée, an action would lie for a breach of the covenant, without a demand, as it was their duty to notify him that the event had happened, and what land they would convey.
3. The rights of the obligee cannot be defeated, by a contrivance by the obligors, by which the patent for the land mentioned in the covenant is caused to be issued to another.
4. The objection that there was no consideration for the covenant, cannot be taken on demurrer to the declaration.

Error to the Circuit Court of Macon.

DEBT, by the plaintiff in error, on a penal bond of the following tenor:

We hereby bind ourselves in the penal sum of one thousand dollars, to convey to Joseph Fitzpatrick, son of Bird Fitzpatrick, a half section of land, situate in Macon county, Alabama, worth five hundred dollars, on a patent issued to William Walker, or to Edward Hanrick, as executor of William Walker's estate, to the N. 1-2, 31, 15, 23, situate in Macon county, Ala. Witness our hands and seals, this 16th Dec'r. 1843.

EDW. HANRICK, (seal.)

LEMUEL MERILL, (seal.)

GEO. STONE. (seal.)

The first count of the declaration, after setting out the bond according to its legal effect, avers, that a patent heretofore issued by the government of the United States, to wit, on the 1st December, 1844, to said half section of land, so

described as aforesaid, to said William Walker, or said Edward Hanrick, as the executor of the estate of said Walker, the said defendants have not, nor have any, or either of them conveyed to the said plaintiff a half section of land, situate in said county, worth the said sum of five hundred dollars, but have hitherto wholly refused, &c. &c. though often requested so to do.

The second count sets out the bond literally, and avers, that afterwards, to wit, on the 1st December, 1844, a patent did issue for the land described in the bond, to one Nimrod E. Benson, by the procurement, and assent of the said Edward Hanrick, and that the same would have issued to Wm. Walker, or to Hanrick as his executor, but for the procurement of the said Hanrick, and avers, that on the 1st day of February, 1845, a conveyance of the said land was demanded of Hanrick, in accordance with the terms of the said writing obligatory, who then and there refused to convey to the said plaintiff a half section of land in Macon county, worth the sum of \$500, or a half section of land of any other value, nor have either of the other defendants yet, &c. &c.

The defendants demurred to both counts of the declaration, and the court sustained the demurrer, which is the matter now assigned as error.

GUNN, for plaintiff in error, insists that the court erred in sustaining the demurrer, and that each count contains a good cause of action, with all averments and breaches necessary to have been made, as will be fully shown by the cases of *Williams v. Harper*, 1 Ala. 502; *Watts' ex'rs v. Shephard*, 2 Ib. 425; *Andrews v. Williams*, 11 Conn, 326; *Forrester v. Jones*, 7 Ala. 493; *McNeil's ex'rs v. Reynolds*, 9 Ib. 313; *Teague v. Williams*, 7 Ib. 850; *Brahan v. Ely*, 3 Stew. 182.

From the contract set forth in the record, differing as it does from an ordinary title bond, no necessity can exist for any tender of title, or demand of abstract neither an averment of notice, it being alledged that the patent issued by the procurement and consent of said Hanrick.

The instrument shows from its face to have been given upon compromise of a doubtful right, which is a good consideration to support a promise. Besides the instrument itself is evidence of a valuable consideration. As to which see *James v. Scott*, 9 Ala. R. 579; *Keizer v. Loch*, Ib. 269; *Click v. McAfee*, 7 Porter, 62; *Young v. Foster*, Ib. ; *Reid v. Edwards*, Ib. 508; *Evans v. Saunders*, 8 Ib. 497.]

BELSER, CHILTON and McLISTER, contra, cited *Wade v. Killough*, 5 S. & P. 450; 7 Johns. 341; 4 Id. 235; 1 Id. 139; 1 Vesey, 128; 3 Term, 374.

ORMOND, J.—The objection to this declaration, because it does not aver a demand of the obligors, before the action was brought, cannot be maintained. The case of *Wade v. Killough*, 5 S. & P. 450, establishes the necessity for such a demand, where the obligor covenants to make a demand on a day certain; but where the ability of the obligor to make title depends upon a fact within his own knowledge, or upon the happening of an event of which he has better means of knowledge than the obligee, it is his duty to give notice to the obligee of his ability to perform his contract, and if this is not done, he cannot complain that the obligee has not demanded title. Such was the case of *Williams v. Harper*, 1 Ala. 502, where the obligor undertook to make title to a tract of land, if by a time stipulated he should become satisfied of his ability to do so, otherwise to pay a certain sum of money. This court distinguished the case from *Wade v. Killough*, as there the title was to be made on a day certain, and not upon a contingency.

So in this case, the title is to be made when a patent issues from the government for a particular tract to W. Walker, or to Hanrick, as his executor. This being a fact peculiarly within his knowledge, it was his duty to inform the plaintiff of the fact when it happened, and this knowledge on his part, will affect equally his co-obligors, as they have jointly bound themselves to convey to the plaintiff, upon the happening of this event, and it was their duty, as soon as it oc-

curred, to inform him of their ability to perform their covenant.

The meaning of this obscure covenant seems to be, that as soon as a patent issued to Walker, or to Hanrick, as his executor, then the obligor's bound themselves to convey to the plaintiff, a half section of land in Macon county, worth \$500. This is the most favorable construction of the instrument for the obligors, and as it is the one put upon it by the plaintiff in his declaration, we shall assume it to be correct. The necessary inference from this contract is, that the preliminary steps had been taken to authorize a patent to issue from the general land office, for the particular tract of land mentioned in the contract, to Walker, or to Hanrick as his executor, and the issuing of the patent is only referred to, to indicate the time when the plaintiff was to be entitled to a conveyance, either of that tract, or of a half section of land worth \$500, in Macon county. This right cannot be defeated by a contrivance, by which the patent is caused to be issued in the name of a third person, and whether this result is brought about by the intervention of Hanrick alone, or by all the obligors, the result must be the same.

The undertaking to convey the half section of land, on the happening of this event, not only admits its possibility, but also precludes the obligors from preventing its occurrence by their own act. To permit the rights of the plaintiff thus to be defeated, would be to allow the obligors, by their own act, to render nugatory and unavailing their own covenant, in violation of the maxim, that no one shall take advantage of his own wrong. It is a rule of universal application, that where a right is to accrue upon the performance by one of an act, an offer to perform, is equivalent to a performance, if prevented by the party in whose favor it is to be done. The rule deduced from the facts, as governing this case, is but a modification of the same principle, both deriving their authority from the maxim just cited.

The objection that there is no consideration for the covenant to convey the land, cannot be taken by a demurrer to the declaration. The statute makes the writing evidence of the debt, or duty for which it was given, and if it did not

import a consideration at common law, such is the effect of the statute, as has been repeatedly held. The consideration can only be put in issue by a special plea, and the burden of proof will then be on the pleader. [Young v. Foster, 7 Ala. 424, and Holman's heirs v. The Bank of Norfolk, at the present term, where this question is fully considered.

The objection, that the contract is too uncertain to be enforced, is not well taken. It is to convey, on the happening of a certain event, a designated tract of land, or another half section of land of the value of \$500, situate in Macon county. This alternative is for the benefit of the obligors, and as it was their duty, when the event happened, to notify the plaintiff whether they would convey the designated tract, and if not, which they would substitute in its place, in virtue of the power reserved; it was a matter which by the very terms of their contract, they engaged to render certain.

Let the judgment be reversed, and the cause remanded.

CRAYTON, USE, &C. V. CLARK, AND ANOTHER.

1. To entitle the defendant to set off a note payable to a third person, he must prove its genuineness, and that it was indorsed to him previous to the commencement of the suit; the mere appearance of the payee's name written on the paper, does not warrant the inference that the defendant is its legal proprietor.
2. If a garnishee indebted by note, have notice of its transfer, before he answers, he should state it, or if he acquires notice afterwards, within time to amend his answer before judgment is rendered thereon, he should make it known to the court; and if he fails to do so, he cannot avail himself of the payment of a judgment rendered against him as a garnishee, in defence to an action brought by the assignee of the note.
3. Where the payee of a note assigns it by delivery merely, so as to make it necessary to sue in the name of the party beneficially interested, the

maker cannot set off a demand acquired agasnst the payee, after he had notice of the assignment.

4. It is not necessary that the assignee of a note by indorsement, or delivery, should give notice by himself or an agent, that he is the holder of the paper, to exclude sets off acquired subsequent to the assignment; but it is sufficient if the maker is informed of the transfer by one who has knowledge of the fact, and speaks understandingly.

Writ of Error to the Circuit Court of Marion.

THIS was an action of debt at the suit of the plaintiff in error, on a bill single, for the sum of \$163 63, dated the 26th January, 1843, and payable to the plaintiff or bearer, on the 1st March, 1844, in the notes of the Bank of the State of Alabama, or any of its branches.

The defendant pleaded several pleas, with leave to give any matter in evidence that would be a defence to the action. Thereupon the cause was submitted to a jury who returned a verdict for the defendants, and judgment was rendered accordingly. On the trial, a bill of exceptions was sealed at the instance of the plaintiff, from which it appears that after he had read to the jury the note declared on, the defendants proved the execution of a note by the nominal plaintiff, on the 4th June, 1843, to Hiram Crayton, or bearer, for \$135, payable one day after date; that sometime in the year 1844, the nominal plaintiff left the State, and two days thereafter defendant purchased this note of its payee. *Further*, it was delivered to him without any indorsement, because none of the persons present could write; but H. Crayton promised to make a written assignment at any future time, if necessary. No other evidence was adduced to prove the indorsement, but there was a blank indorsement thus:

his
 "Hiram ~~X~~ Crayton." The plaintiff thereupon moved the
 mark

court to exclude the note from the jury, because the indorsement was not proved, but the court overruled the motion, and allowed the note to go in evidence as a set off; whereupon the plaintiff excepted.

The defendant proved that a judgment had been rendered against him as a garnishee at the suit of one Cantrell against the nominal plaintiff, which he had paid—amounting to \$12 68 $\frac{1}{2}$: *Further*, that on the day the note sued on became due, he tendered to the party for whose use this suit is brought, the balance due on the note, and then (at the trial) paid the same to the clerk.

It was then proved, on the part of the plaintiff, that on the morning after the nominal plaintiff left the State, and before the defendant purchased the note here allowed as a set off, the witness informed him that the beneficial plaintiff held the note on which this suit is brought, to which defendant made no objection: *Further*, on the evening of the same day, defendant came to witness and informed him he had obtained a set off against the note. There was no evidence that the witness who gave the notice to the defendant acted as an agent of the holder of the note, or was requested by him to give the notice.

The beneficial plaintiff was the security of the nominal plaintiff, in an indebtedness to one of the banks, and the note was given up to the former, in consideration of his liability.

The plaintiff prayed the court to charge the jury, that it did not require a written, or direct personal notice to the defendant that he held the note; but if the jury believed from the evidence, that the defendant knew that the beneficial plaintiff held the note before he (defendant) purchased the note offered as an off set, or answered to the garnishment, then the note and payment as a garnishee were not good sets off. This prayer was denied, and the jury were instructed that the plaintiff must in person, or by an agent, have given the defendant notice that he held the note declared on, or the sets off previously acquired would be good. To the refusal to charge, and the charge given, the plaintiff excepted, &c.

W. S. EARNEST, for the plaintiff in error.

W. R. SMITH, for the defendant, insisted that the indorsement of the note by H, Crayton to the defendant, was suffi-

ciently proved. [3 S. & P. Rep. 35.] The evidence was satisfactory to show why it was not indorsed in writing. The notice was insufficient to show that the payee had parted with the note, so as to exclude the sets off.

COLLIER, C. J.—To entitle the defendant to set off a note which has been assigned to him, he must prove that the assignment was made prior to the commencement of the action. [Minor's Rep. 7.] Nor can the defendant set off a demand on which he cannot maintain an action in his own name. [1 Ala. Rep. 413.] And when the plaintiff's note is offered as a set off, its genuineness must be proved. [Minor's R. 178; 6 Ala. R. 893.] In *Cass v. Northrop*, 1 S. & P. 89, it was decided, that where the defendant relies upon a note made by the plaintiff, which he claims as an indorsee, the indorsement must be proved. In the case at bar it was proved, that the note which the defendant obtained was not indorsed when it was delivered to him, and there is an entire want of evidence to show an indorsement at a subsequent time. The cases cited are conclusive upon the point, that the defendant's legal title is not a fair inference from the appearance of the payee's name written upon the paper, and consequently the set off was improperly admitted.

In respect to the sum paid by the defendant upon the judgment which was rendered against him as garnishee, its admissibility as a set off will depend upon the fact whether the defendant was informed at the time he made the answer, that the nominal plaintiff had parted with his interest in the note sued on. If he then possessed this information, or acquired it afterwards, within time to have enabled him to amend his answer before judgment was rendered thereon, he should have made it known to the court; and if he failed to do so, he could not avail himself of the payment as a set off, notwithstanding the judgment against him.

Where the payee of a note assigns it by delivery merely, so as to make it necessary to sue in the name of the assignor for the use of the party beneficially interested, the maker cannot set off a demand acquired against the payee after he had notice of the assignment. [1 Bay's Rep. 246; see also,

5 Cow. Rep. 231 ; 9 Id. 295 ; 2 Verm. Rep. 569 ; 4 Id. 26 ; 2 Miss. R. 60 ; 11 Serg. & R. Rep. 48 ; 3 Hals. Rep. 209 ; 3 Wash. C. C. Rep. 93 ; 6 Verm. R. 12 ; 11 Wend. Rep. 504.]

We have a statute which provides that promissory notes and other writings for the payment of money, or any other thing, may be assigned by indorsement, so as to invest the assignee with a right of action in his own name: This statute entitles the maker of a promissory note thus indorsed to avail himself against the indorsee of all "sets off possessed against the same, previous to notice of the assignment;" but does not prescribe the mode in which the notice shall be given in order to exclude sets off acquired after the payee had divested himself of his interest in the paper. We cannot think it is necessary for the indorsee, or an agent deputed by him, to give the notice ; but it is quite sufficient if the maker is informed of the transfer by one who has knowledge of the fact, and speaks understandingly. [4 Dall. Rep. 370.] If with notice thus communicated, he should purchase demands against the payee, to be used as sets off, they should be rejected upon the ground that it would be a fraud upon the assignee's rights thus to use them. This reasoning applies with all force in favor of the beneficial holder of paper transferred by delivery ; though it is not embraced by the letter of the statute. The common law it will be seen by the cases cited, is competent to protect his interest, and would reject all demands against the nominal plaintiff acquired after notice of assignment. It follows that the ruling of the circuit court is not in conformity to law—its judgment is consequently reversed, and the cause remanded.

HERRIN v. WOODWARD.

1. It seems that a judgment against a sheriff and his sureties for failing to pay over money collected, will not carry damages at the rate of five per cent. a month until the sum is collected; but whatever the construction of the statute is, a coroner is not liable for the omission to collect the five per cent. per month when neither the execution nor judgment directs it to be done.

Writ of Error to the Circuit Court of Clarke.

MOTION by Herrin against Woodward, as coroner of Clarke county, for failing to collect money on an execution issued at his suit, against the sheriff of said county and his sureties.

At the trial, it appeared that a judgment was rendered at the April term, 1846, in favor of the plaintiff against one Savage as sheriff, and others as his sureties, for failing to pay over money collected on a certain execution for the sum of \$1293, as well as \$16 (this being five per cent. per month for damages for failing to pay over the first sum,) besides costs. On this an execution issued, directing the coroner to make the above named sums. The execution was indorsed to compute interest from the 4th April, 1846, with a direction that no security of any kind was to be taken on the *fi. fa.* The sheriff attested the principal sum and interest, but did not collect five per cent. per month on the amount of the execution.

The plaintiff requested the court to charge the jury, that the five per cent. per month as damages against a sheriff for failing to pay over moneys collected, must be computed from the date of the demand from the sheriff until the money was collected. This the court refused, but instructed the jury, that under the execution in this case, the coroner was not bound to collect five per cent. after the rendition of the judgment against the sheriff for failing to pay over money collected; and that nothing more than the legal rate of interest

should have been collected on the judgment so rendered. The plaintiff excepted to the charge given, as well as to the refusal to give the one requested, and now assigns these matters as error.

J. W. PORTIS, for the plaintiff in error, cited Dig. 217, § 81; 218, § 83; 219, § 88; Barton v. Peck, 1 S. & P. 486; and insisted the true construction of the statutes was, that the damages should be computed until the entire sum was collected from the sheriff.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—There can be no question as to the construction of the first statute found in our Digest, or the mode by which the damages shall be computed, when the judgment is against a sheriff for failing to pay over money collected, as the direction is express that these shall be at the rate of *fifteen per cent. per annum* from the return day of the execution until the judgment shall be discharged, and the court is required to give judgment accordingly. [Dig. 217, § 81.] So too the statute of 1824, which gives a summary remedy against constables and their sureties, provides in the same express manner that the damages of five per cent. per month shall continue after the judgment, and until the money is paid; the clerk too, is directed to frame his execution so as to advise the sheriff of this circumstance. [Dig. 219, § 88.] The act of 1826, under which the judgment was had against the sheriff and his sureties, omits entire these specific directions for the continuance of the damages, and we incline to think the proper construction is, that the extraordinary damages are only to be computed until the judgment is rendered, and that it afterwards carries only the customary interest. If the intention was to give the damages in the same manner as is allowed by the two other statutes referred to, nothing was more simple than to have inserted similar provisions in this. [Dig. 218, § 83.] But whatever may be

the true construction of the act, we think the coroner in this case was not subjected to the burthen of deciding, as his entire authority to collect is based on the execution, and that certainly gives no warrant to collect more than the usual rate of interest. Even if he was called upon to refer back to the judgment, it would be the same, as that does not indicate that any thing more than the named sums are recovered, or are to be collected from the defendants.

Judgment affirmed.

CONNER v. TUCK.

1. To affect one with knowledge of a secret trust, who was purchasing land from one, who was apparently the owner, and in whom the legal title was vested, it must be shown that he was fully aware of the precise terms of the trust, before he completed his purchase. Indefinite and uncertain admissions, will not authorize the positive denials of the answer.

Error to the Chancery Court at St. Clair.

THE bill was filed by the defendant in error. The material allegations are, that on the 8th June, 1836, one Abney being seized in fee of a tract of land, which is described, sold and executed to the plaintiff in error a deed in fee simple for the same. That on the 11th December, 1840, James M. Conner executed, and delivered to one Jesse Duren, a deed in fee simple, for the same land, the deed on its face expressing to be for the consideration of \$3000, and that on the 16th February, 1841, Duren executed a title in fee to the complainant for the land, in consideration of the sum of \$1,-
172 75.

That one David Conner having by some means obtained possession of the deed from Abney to James M. Conner, erased from the deed the name of James M. wherever it occurs,

and inserted his own, which was done without the knowledge or consent of either of the parties to the deed, and also procured a certificate of a justice of the peace upon the deed, that Abney and wife appeared before him, and acknowledged the execution of the deed to David Conner, and afterwards caused it to be recorded.

That David Conner afterwards, on the 14th August, 1838, conveyed the land in trust to two persons of the name of Brown and Puller, in trust for the benefit of the Columbus and Tombigbee Transportation Co. That the lands were sold by the trustees under the trust deed, to one Green Womack. These parties are all charged to be non-residents of the State. The prayer of the bill is for the reformation of the deed, made by Abney to J. M. Conner, fraudulently altered by D. Conner.

By an amendment to the bill, James M. Conner is made a party, upon the allegation, that he is interested in some way in the lands, or in the produce thereof.

James M. Conner answered the bill, admitting the sale of the land by Abney to him, and the sale by him to Duren. That although the deed made to Duren was absolute on its face, it was expressly in trust, that Duren should sell the lands for the best price he could get, and pay respondent one half the proceeds of any sale he might make, and that no other consideration was given or promised by Duren, and that this was well known to complainant when he purchased from Duren. He answers from belief, and charges that the only consideration passing from complainant to Duren, was the discharge of a debt due from the latter, which, from his insolvency, could not have been collected from him.

J. M. Conner also exhibited a cross bill against complainant, charging these facts, and further, that he, complainant, took from Duren an obligation, with security to indemnify him, in addition to the deed made by Duren. He charges that the only consideration paid by complainant to Duren, was a bill of exchange, on which Duren was a party, which was worthless. Admits the alteration in the deed made by David Conner, but denies that he had any power to make it,

or that he ever had title to the land, and denies that any right or title passed to the Tombigbee Company by his deed, or that any right was acquired by the purchaser under it. He prays for the reformation of the deed by striking out the name of David Conner, and inserting his own, and for other relief, &c.

Tuck, in his answer to the cross-bill, denies that the conveyance from J. M. Conner to Duren, was upon trust, but that he purchased from Duren without any knowledge, or suspicion. Admits that a part of the consideration paid by him for the land, was a promissory note made by D. Conner to Duren, for \$875, which had been previously assigned by the latter to complainant. That he had proceeded by attachment against Conner on the note, and that Duren was insolvent, but insists that the note was a full consideration for the land. That the indemnity taken by him from Duren, was intended to guard against the fraudulent conveyance of David Conner to the Tombigbee Company.

The evidence taken in the cause is sufficiently set out in the opinion of the court.

The chancellor decreed that the deed be reformed, by restoring the name of James M. Conner, as grantee in the deed from Abney; declared the sale made under the trust deed to Womack null and void, and dismissed the cross-bill of J. M. Conner. From this decree, this writ is prosecuted by J. M. Conner. The assignments of errors question only the dismissal of the cross bill.

POPE and RICE, for plaintiff in error.

1. If the facts establish a *fraud* in obtaining a deed, or in "perverting it to a use in opposition to the agreement between the grantor and grantee," chancery will set it aside. [Kennedy's Heirs and Ex'rs v. Kennedy's Heirs, 2 Ala. Rep. 622; Graff, et al. v. Castleman, et al. 5 Rand. Rep. 195; Sledge's Adm'r, et al. v. Clopton, 6 Ala. R. 600, 601; Watkins v. Stockett, 6 H. & Johns. R. 435; Hutchins v. Lee, 1 Atk. Rep. 447; Young v. Peachy, Ib. 254; Story's Eq. 197 to 200.]

2. Parol evidence is admissible to show the fraudulent use of a deed; or that a party receiving an absolute deed upon a

promise that he would dispose of the property conveyed by it in a particular manner, refused to perform his promise. [Head notes, § 11, 13, 14, 25, of *Kennedy's Heirs, &c. v. Kennedy's Heirs*, 2 Ala. R. 572-3; see also the authorities cited in the above case.]

3. One who purchases *with notice* takes subject to all equities against his vendor. [*Strange, et al. v. Keener, et al.* 8 Ala. R. 819; *Oden v. Stubblefield*, 4 Ala. R. 42, 43; *Sledge's Adm'r, et al. v. Clopton*, 6 Ala. R. 600-1; *Graff, et al. v. Castleman*, 5 Rand. 195; *Oliver, et al. v. Piatt*, 3 How. (U. S.) Rep. 401, 409.]

4. If a trustee sell in payment of his own debt, the sale is void. [*Jackson and others v. Updegraff*, 1 Rob. Vir. Rep. 112, note; *Wilson v. Moore*, 1 Mil. & Kee. Rep. 337; *Graff et al. v. Castleman, et al.* 5 Rand. Rep. 195; *McAllister v. Ormstead*, 1 Hump. 210, 227.]

5. In his *amended* bill making J. M. Conner a party, Tuck says, J. M. Conner "is interested in said lands, or the proceeds thereof," and seeks by the prayer of his original bill, not merely (as supposed by the chancellor) to restore the altered deed; but he *expressly* prays to have "his title," decreed to him, free from *all* incumbrances, besides the prayer for *general relief*. In such a case, if J. M. Conner had not defended, he would be considered as "abandoning" his title. [*Davenport v. Bartlett, et al.* 9 Ala. 180.]

6. To make his defence complete, he must file his cross bill. [*Brown v. Story*, 2 Pai. R. 504; *Cullum and another v. Erwin, Adm'r*, 4 Ala. 461; *Daniel, et al. v. Morrison's Ex'r, et al.* 6 Dana, 182.]

7. Decree *pro confesso* as to Duren, who is a non-resident, obviates necessity for proof as to him. [*Wellborn, et al. v. Tiller, et al.* 10 Ala. 305.]

8. Tuck says in his answer to cross bill, that there was no trust as between Duren and Conner, "that he had ever heard of,"—he does not deny that there was such a trust. It is clearly proven by Foreman, who speaks to this point of his own knowledge, and it is proven by several witnesses that Duren and J. M. Conner both often, and uniformly so said—and several witnesses testify that Tuck acknowledged that he knew of that trust. The proof on this subject is am-

ple, (coupled with Tuck's admission, of record, that Conner is interested,) even if Tuck had denied directly that there was such a trust. [Gibbs & Labuzan v. Frost & Dickerson, 4 Ala. R. 721; Clark's Ex'rs v. Van Rumsdick, 9 Cranch, 153.]

9. A party's own statements may be made testimony for him, when drawn out by the opposite party, on cross-examination. [2 Phil. Ev. 732, note 513; 1 Starkie's Ev. 144, 145.]

10. The original and cross bills embrace the same subject matter only—all the parties in interest, and the whole matter as to the title to the land being before the chancellor, he should have set aside the deed from J. M. Conner to Duren, and the deed from Duren to Tuck, and restored the deed from Abney and wife to J. M. Conner. [Barbour's Ch. Pr. title, Cross Bill, and cases cited *supra*, No. 6.]

W. P. CHILTON, contra.

1. The cross bill was properly dismissed, as it embraces matter not involved in the original suit—and no decree can be pronounced upon such matter. [Gallatin v. Erwin, Hopk. Rep. 48; S. C. 8 Cowan's R. 361; Gouverneur v. Elmen-dorph, 4 Johns. C. R. 327.] A cross bill should properly be filed by leave of the court, and can only be sustained on matters growing out of the original suit, [Daniels, et al. v. Morrison's Ex'rs, 6 Dana, 186,] and must be confined to the subject matter of the original bill. [May v. Armstrong, 3 J. J. Marsh. 262.]

2. But in a case of this character, where the party is allowed to aver against his solemn act, and show that an absolute deed was intended merely to confer a power of sale, (if he may legally do so,) the proof should be clear and positive. Quere? As to whether complainant can avoid his deed by such proof. [See Thomas v. McCormack, 9 Dana's R. 108; Lloyd and Mott v. Ex'rs of Inglis, 1 Dess. R. 333.] To admit such proof, there should be charge of fraud, or mistake, in the execution, or some vice in reference to the consideration of the deed. [Ib.; Fitzpatrick, et al. v. Smith, 1 Dess. R. 340; Dupre v. McDonal, 4 Ib. 209; Hitt v. Hol-

liday, 2 Litt. R. 337 ; Jones v. Slubey, 4 H. & Johns. 372 ; Fishback v. Woodford, 1 J. J. Mar. R. 87.]

ORMOND, J.—The parties litigant in this court, both admit the correctness of the decree of the chancellor as it respects the reformation of the deed from Abney and wife, to James M. Conner, by the restoration of his name as grantee in the deed, instead of that of David Conner, which, as the proof conclusively shows, had been falsely interpolated. The only question then arises out of the cross bill filed by J. M. Conner, in which it is alledged that his conveyance of the land to Duren, though absolute on its face, was executed, and delivered to him upon a parol trust, that Duren should sell the land for the best price possible, and pay the complainant one half the purchase money, and that the complainant purchased with knowledge of this trust.

If James M. Conner is entitled to the relief he seeks, the cross bill in this case was proper. As defendant to the original bill, he could pray no other decree than to be dismissed with his costs ; claiming as he does, one half the purchase money of the lands, he could not ask a decree in his favor without himself becoming an actor by filing a bill. [Cullum v. Erwin, 4 Ala. 461.] The subject matter of the cross bill may, in one sense, be said to grow out of, and be connected with the subject matter of the original bill, and as he is made a defendant for the purpose of concluding his title, it may be conceded the cross bill was proper. [Story's Eq. Pl. 316.] But this point is not necessary to be determined in this case. The consent of the court was not necessary previous to filing the bill. How far the original suit would be arrested in its progress by the filing of a cross bill, and in what cases, and upon what conditions it would be stayed, are questions we are not now called on to determine, as no such question was made in the court below.

Concluding that the parol trust existing between Conner and Duren could be established, and enforced against a purchaser from Duren, notwithstanding the absolute title had been conveyed to him, it should be fully and clearly proved, and

notice of the terms of the trust should be distinctly brought home to the purchaser, previous to his purchase. That such a parol contract existed between Duren and J. M. Conner, as is stated in the bill, appears to be made out by the testimony. Tuck in his answer, denies any knowledge of such a trust, but it is contended that the proof is ample to show that he did know of its existence, previous to his purchase.

Foreman, a witness, deposes that Tuck told him, that at the time he purchased the land he knew that J. M. Conner had an interest in it. Peter Conner, another witness, states that Tuck admitted to him that he knew of the claim of J. M. Conner, and others, when he purchased, and that he had taken a bond with surety from Duren, to indemnify him if the title was not good. And Blackwell, another witness, that he informed him that he knew J. M. Conner had an interest in the land when he purchased.

It is impossible, in our judgment, to consider these indefinite, and uncertain admissions, as establishing, in opposition to the positive denial of the answer, that Tuck was aware of the precise character of the trust, which, extraordinary as it is, appears to be made out by the proof. It is entirely consistent with these loose declarations of a knowledge of some uncertain interest remaining in Conner, that Tuck may have supposed that Duren, who was invested with the legal title, had a full and entire discretion as to the sale of the land, if he was not, as he appeared to be, the absolute owner. To hold him responsible for this secret trust, it must be shown that he was fully aware of its precise terms, before he completed his purchase. That is not shown by the testimony in the cause.

The taking by Tuck of a bond of indemnity, is entirely consistent with his ignorance of the trust here set up, as it appears there was a cloud upon the title, by the sale of the same land under the trust deed made by David Conner.

But if the trust had been known to Tuck, we do not perceive the case would be varied. The trust was to sell the land, and pay one half the proceeds to Conner. It was an

unlimited confidence reposed in Duren, by Conner. If he had received money instead of the note, Conner must have relied on his personal ability to pay, and it would be a debt merely due from him to Conner, for it cannot be pretended that Tuck was bound to see to the application of the money. It is true, that if Tuck had been fully apprised of the terms of the trust, and had fraudulently combined with Duren, to get the land in exchange for his own or other worthless paper, relief would have been granted in chancery. But that is not the case made by the bill or proof. ~ The note received by Duren, was made by David Conner, and indorsed by Duren. It does not appear that David Conner is insolvent, and it is shown that the note was secured by a deed of trust on property. It appears that Tuck had sued Duren on his indorsement, and that the sale of the land was a compromise of this suit. We are unable to perceive any evidence of fraud in this. If as alledged in the bill, Duren has not paid Conner any part of the purchase money, or transferred to him the note to him in payment, he must abide by the consequence of his own acts. If a loss is to fall on one of two persons equally innocent, he must bear it, who by his conduct has enabled another to do the wrong.

We are thus brought to the conclusion, that the proof does not make out such a case as would authorize the relief sought by the cross bill, and this being in accordance with the view of the chancellor, his decree must be affirmed.

FALLS v. WEISSINGER.

1. Where a bond is executed under an order in chancery, conditioned that certain slaves that had been seized to satisfy such decree as might be "rendered in the suit," should be returned, if the decree contemplated

their return, the bond is not annulled, or the liability of the obligors restricted or impaired, by an amendment of the bill which merely associates other parties with the complainant, (the obligee,) without varying the frame of the bill, or extending or limiting the liability of the obligors.

2. There is no statute which requires the sheriff to return "forfeited," a bond taken in a suit in chancery, conditioned for the forthcoming of property if the decree requires it; consequently the obligee may maintain an action thereon, without showing such a return.
3. Where a bill is filed to subject a slave to the payment of the complainant's demand, and the defendant executes a bond with surety, conditioned for his delivery if the complainant is successful, the death of the slave previous to the rendition of the decree, or an order requiring his delivery, will absolve the obligors from a compliance with the condition.
4. Where the defendant pleads the performance of the condition of his bond generally, and another affirmative and more special plea which was good in itself, but the matter of which is admissible under the plea of performance, if a demurrer is sustained to the second plea, an appellate court will not refuse to reverse the judgment, because the defendant could have had the benefit of it under the pleadings on which the cause was tried; unless it appears that he in fact availed himself of such special defence.

Writ of Error to the Circuit Court of Lowndes.

THIS was an action of debt, at the suit of the defendant in error, on a bond executed by the plaintiffs in error, with three other persons on whom the process was not served. The bond was taken under an order in chancery, by which certain slaves and other property were seized to satisfy such decree as might be "rendered in the suit;" and was executed with the condition that they should be returned, if the decree contemplated it. After the execution of the bond, there was an amended and supplemental bill by which several other persons were made complainants together with the obligee. It is then alledged that a final decree was rendered in favor of the complainants, which required the return of the slaves according to the undertaking of the obligors; and that the defendants had failed to perform the condition, &c.

The defendants pleaded that they had all the slaves mentioned in the condition of their bond ready to satisfy the decree in chancery, except one named John, who died before the rendition of the decree; and that they did actually deliver the surviving slaves to the sheriff. To this plea there

was demurrer, which being sustained, an issue was submitted to a jury, who returned a verdict for the plaintiff for \$600 debt, \$87 20 damages, and judgment was rendered accordingly.

BOLING, for the plaintiffs in error, made the following points: 1. The circuit court erred in not sustaining the demurrer to the declaration. [1 Stewt. R. 10; 1 Por. R. 187.] 2. In not sustaining the demurrer to the pleas which alledged the death of the slave John, as an excuse for his non-delivery. [2 Stewt. & P. Rep. 344; 5 Id. 123.]

C. G. EDWARDS, for the defendant in error, insisted that the defendant below was not prejudiced by sustaining the demurrer to his pleas, as the pleas on which issues were submitted to the jury would admit evidence of the facts set forth in the former, if these facts constituted an available defence. [4 A. R. 230.] The death of the slave pending the litigation in chancery is a loss which must fall upon the obligors—it may be assimilated to the destruction of the chattel pending the action of *detinue*, which it has been repeatedly held does not absolve the defendant from liability. [8 T. Rep. 259; 2 Eng. C. L. Rep. 281; 5 Stewt. & P. Rep. 123; 8 Por. Rep. 564; 2 Ala. Rep. 555.]

COLLIER, C. J.—The filing of the amended and supplemental bill, by which other parties were associated with the complainant, the obligee, did not, so far as the pleadings inform us, vary the frame of the bill or ask other and different relief from that sought in the first instance. It did not in any manner extend or limit the liability of the obligors; nor does it appear to have restricted or impaired the rights of the obligee. The declaration then could not have been adjudged bad on demurrer merely because new parties were introduced upon the record after the execution of the replevy bond.

There was no necessity for the sheriff to have returned the bond forfeited to authorize the obligee to maintain an action against the obligors for a failure to perform its condition. We have no statute which makes such a requirement in re-

spect to a bond like that declared on; and such a return, or the want of it, can avail nothing. To entitle the plaintiff to a *summary remedy* on a forthcoming bond, and perhaps in other cases, the statute directs that the bond shall be returned "forfeited." But if there was an omission thus to return it, we apprehend that the plaintiff would not be foreclosed of a remedy at common law.

It is insisted that the plea which sets up the death of the slave as an excuse for the performance of the condition of the bond *pro tanto*, cannot be supported; that the decisions of this and other courts which maintain that if the chattel perish pending an action of *detinue*, and in analogous cases, the plaintiff's right to recover will not be affected, are opposed to such a defence. If a party is in default for not performing a duty, as for the non-delivery of a chattel, he cannot absolve himself from a liability which has already accrued, by proof that the thing has been lost, or destroyed by the act of God, without his fault; more especially, if before the happening of the event, an action has been instituted upon the liability. The principle upon which this rule rests is well supported both by reason and authority, though in some cases it may have been pressed too far. It supposes that if the right of action becomes perfect by the failure to deliver an article of personal property to the person entitled to it, the party in default shall not relieve himself from the consequences by proving that a delivery afterwards became impracticable by something occurring *post factum*, which the person entitled had no agency in producing.

In *Burgess and Davis v. Sugg*, 2 Stewt. & P. Rep. 341, which was an action on certain forthcoming bonds, the plea alledged that the slave for the delivery of which the obligors had stipulated, *died previous to the commencement of the suit*. The court said, "the right of action on the bond refers to, and accrued at the time of the forfeiture; and if the death of the slave occurred subsequently thereto, it afforded no bar to the plaintiff's right of action, and was correctly ruled to be bad on demurrer." This remark of the court, if it can be regarded as settling any principle beyond the precise point then in judgment, rather intimates that if the slave had died before the bonds were forfeited and the liability fixed, the

obligors would have been relieved from a performance of their undertakings.

In the case at bar it cannot be inferred that the defendant in the suit in chancery was in default for not delivering the property seized by the sheriff, or that the order contemplated its delivery to the complainant, if the replevy bond had not been executed. The declaration alleges that the purpose of the bill was the foreclosure of a mortgage. We must then intend that the object of the order and consequent seizure was to secure the slaves, so that they should be forthcoming to answer the decree of foreclosure and sale. In this view the bond, so far as it respects the present case, was in legal effect nothing more than a forthcoming bond; the breach of which depended upon the decree in favor of the complainant. The question then is, did the death of the slave previous to a breach, relieve the obligors from a compliance with their engagement as it respects him. In *Perry v. Hewlett, et al.* 5 Porter's Rep. 318, which was an action upon a covenant by which the defendants undertook to pay the plaintiff the sum of \$150 for the hire of two negroes, *and to return them on the twenty-fifth day of December, eighteen hundred and thirty-four*—This court said, "the defendants in this case were prevented by the death of the slave Fanny, without their default, from returning her according to their covenant, and they are entitled to a discharge from so much of their contract, as the act of God disabled them from performing."

So in *Givhan v. Dailey's adm'r*, 4 Ala. Rep. 336, it is said, "the principle has been repeatedly acknowledged, that if a party is disabled by an act of God, before breach of his contract, he shall be excused from the performance. Thus, if one man lend his horse to another, who promises to return him by a day certain, or on request, if the horse die before the day or request, without the borrower's fault, the re-delivery will be excused."

The party to whom the slaves were delivered by the sheriff upon the execution of the bond, may be regarded as a bailee and the obligors as stipulators, for their delivery upon the condition provided for; and the effect of the death of one of the slaves will thus far excuse a non-performance in the

same manner as if the case were an ordinary bailment, with or without hire. The cases cited are then, in principle analogous to the present, and show that the death of the slave John before the condition of the bond became absolute, thus far relieved the obligors from a performance of their obligation.

It is however contended for the defendant in error, that although the demurrer to the pleas should not have been sustained, yet as the defendant below might have proved the same fact which they set up under the other pleas, he has not been prejudiced by the judgment on demurrer; and therefore cannot complain of the decision against him. All the pleas were affirmative, and it devolved upon the defendant after the plaintiff had produced the bond and shown a breach, to sustain a defence by proof. Now, although it may be that the plea of performance would have tolerated the admission of all the facts alledged in the several pleas; yet we must intend under the circumstances of the case that the demurrer was sustained, because it was supposed that the pleas adjudged bad, did not present an available defence; and that the court would not have admitted evidence of the fact they alledge. Where a demurrer to a plea has been improperly sustained, if it appears that the defendant has had the benefit he could have derived from it, upon the trial of issues on other equivalent pleas, he cannot insist upon the error; as no real injury was done him. [See 4 Ala. Rep. 230; 8 Id. 161; 3 Id. 942.] It remains but to add, that the judgment is reversed and the cause remanded.

RICKETTS, ET AL. V. GARRETT.

1. The service of an injunction at the suit of a stranger, asserting a title to a ferry in the possession of a lessee, restraining him from interfering in

the use of the ferry, is not such a disturbance as amounts to an eviction, and therefore will not prevent the lessor from recovering rent when the bill is dismissed.

2. Although a sheriff serving an injunction may have no authority to expel one from the possession of a ferry, or put another in, yet if he does so, the lessee may consider it a lawful expulsion if the plaintiff in the suit is invested with a paramount title to his lessor.
3. When a record is stated as an exhibit to an answer to a bill in chancery and the exemplification of the suit is given in evidence by the party making the answer, although offered only to show the fact of the suit, and an eviction by means of an injunction allowed in it, the opposite party may read the answer to prove the existence of the record.

Error to the Circuit Court of Marshall.

DEBT by Garrett, as the administrator of Edward Gunter, on a bill single made by Ricketts and others, dated 6th January, 1840, payable the 1st of July then next. The defence was failure of consideration.

At the trial, after the bill single was put before the jury, the defendants proved it was given for the rent of a Ferry on Tennessee river, known as Gunter's ferry, and then read an order of the commissioners court of Marshall county, in these terms, to wit:

"Wendesday, 22d¹ August, 1838—August term, 1838—On the application of J. S. Boggiss and R. S. Randle for leave to run a ferry boat across the Tennessee river, from the south bank at Gunters's Landing, it is considered by the court, that said petition be granted, and the liberty given to the said Boggiss and Randle, to keep a public ferry on the river at said place, and that they be entitled to the exclusive right of the ferriage from the south bank at Gunter's Landing, and that the following rates of ferriage be established." Then follows the rates, &c. which is unnecessary to recite.

The defendants then proved that Boggiss and Randle for several months in the latter part of the year 1838, run boats across said river at said ferry. They then read a transcript of the proceedings in a certain suit in chancery in Madison county, instituted by Boggiss and Randle, against Edward Gunter, and the makers of the single bill, the foundation of

this suit, the object of which was to restrain Gunter and his lessees from using the ferry franchise. A fiat for the injunction was obtained, and that writ issued and was served on the defendants, 31st March, 1840. This bill was dismissed without prejudice, in March 1844. This was offered to show the filing of the bill claiming the ferry, and that defendants had been evicted under the injunction, but the whole proceedings were read in evidence to the jury. The answer set out a license from the county court of Jackson county to Gunter for the ferry in question.

The defendants then proved, that they were put out of possession by the sheriff, and Boggiss and Randle put into possession of said ferry, in April, 1840, under said injunction, and that Boggiss and Randle retained possession for the remainder of the year 1840, to the entire exclusion of the defendants. That so soon as they were evicted, they notified Gunter of the fact.

The plaintiff then read to the jury, an order of the commissioners' court of Marshall county, of May term, 1836, in the following terms, to wit: "Ordered by the commissioners, that the rates of the Gunter's Landing ferry, kept by Edward Gunter, be as follows;" after which are the rates which are unimportant to be recited. The plaintiff then proved that Gunter kept a ferry at the same place in 1817, and continued to keep it up from that time until the 6th January, 1840, when he leased it to the defendants, but the same witnesses proved that at two different times other persons run boats across the river at said ferry, in opposition to Gunter. That the first was about the year 1825, and the other about the year 1831, and each was continued for several months.

It was also proved, that Gunter put the defendants in possession, on the 6th January, 1840. The plaintiff proved that Gunter had possession of both banks of the river, the whole time he kept the ferry. This portion of the evidence was objected to by the defendants, but allowed by the court.

On this state of proof, the defendants asked the court to instruct the jury, that if they believed the defendants were put out of possession of said ferry as aforesaid, they must find for the defendants. This was refused, and the jury instruct-

ed, that the plaintiff was entitled to a verdict if the evidence was believed.

The defendants excepted to the admission of the evidence objected to, as well as the refusal to charge as asked, and to the charge given.

These rulings are now assigned as error.

ROBINSON, for the plaintiff in error, insisted—

1. That a tenant, when sued for rent, may show an eviction under process, and may likewise dispute his landlord's title at least so far as to show a change in it, depriving the tenant of the use of the property. Here the transcript of the chancery cause shows such change of title. [Randolph v. Carleton, 8 Ala. R. 614; Jackson v. Rowland, 6 Wend. 666; Glenn v. Rice, 6 Watts, 44.]

2. There is no proof in the record to counteract the evidence of the title under which the defendants were evicted, or showing that Gunter ever obtained a license to establish his ferry. Such a franchise is the creature of statute. [Aik. Dig. 363, § 26; Ib. 364, § 30.] Whatever right Gunter may have had was in contravention of these statutes, and therefore illegal. The tenant may show this in defence. [13 S. & R. 133.]

3. As no right to keep a ferry can be derived except by license, the highest evidence of this is the license, and consequently the evidence objected to was improper.

4. The court cannot presume a grant from the length of time. In 1817, the country belonged to the Cherokees, and the jurisdiction of Alabama was not extended over the country. It is not shown they had any law or usage authorizing the appropriation of such a privilege by possession; and besides, here the possession was shown to be interrupted.

S. PARSONS, contra:

GOLDTHWAITE, J.—1. The principal question in this case is, whether the disturbance of the defendants in their enjoyment of the ferry, by reason of the allowance of the injunction, at the suit of Boggiss and Randle, is such a matter as will prevent the landlord from recovering rent during the

continuance of the disturbance. The ordinary principle is, that when the lessee has been evicted by a stranger, it is absolutely necessary the stranger entered not by wrong, or by a title derived from the lessee himself, but by force of a legal and an elder title. [Com. on L. & T. 543, and cases there cited.] This is usually shown by a judgment of eviction against the tenant, which is in general conclusive, if the landlord was notified by the tenant, but if otherwise the better opinion seems to be, that the proof of title has to be made as if no judgment had been had. [Cowan & Hill's Notes.] We do not well see on what grounds it can be assumed, that the allowance of an injunction is to be considered equivalent to a judgment. The one is procured upon the *ex parte* statement of the party, and no title, however good, in the landlord, would avail in many cases to prevent the allowance of this writ. The landlord is under no duty to protect his tenant against a trespass, or tortious entry, and if he is ousted by one having no title, the law leaves him to his remedy against the wrong doer. [C. on L. & T. 172.] If the suit in equity had been pursued to such results, that the injunction had been perpetuated, it is quite possible the proper analogy would give the same effect to the decree as would be given to a judgment at law; but the suit having been dismissed, the presumption arises, that the injunction was improperly sued out, and therefore the tenant cannot say, that in consequence of this proceeding, he has been evicted by a lawful title.

2. Although it may well be questioned whether the sheriff had any authority under the writ of injunction to put the defendants out, or others in, yet the effect of the entry by Boggiss and Randle, was the eviction of the defendants, and if they have shown this entry was warranted by paramount title, it is as much a defence to them as if they had been expelled by suit. We apprehend that no one is required to stand a suit when he is perfectly satisfied a recovery must be had, and although at first view it might seem a part of the duty of the tenant to suffer a suit in consequence of the allegiance he owes his landlord, yet we cannot find the rule is thus asserted, except by Mr. Bouvier in his dictionary. [Bou. L. D. tit. Eviction, 378.] But the authorities cited do not

sustain him. [1 Saund. 204, n. 2; Ib. 322, n. 2.] The landlord's possession indeed seems sufficiently protected with us, by allowing him a summary remedy against any one coming into the estate by, from, under, or by collusion with the tenant. [Dig. 251, § 5.] So that there can be no serious practical evils growing out of the recognition of the same rules as to what shall constitute the eviction of a tenant, as obtain in actions upon covenants of warranty for peaceable possession. [See Caldwell v. Kirkpatrick, 6 Ala. Rep. 60; Banks v. Whitehead, 7 Ib. 83.]

3. Having ascertained that an actual expulsion by one having paramount title, is equivalent to a lawful eviction, it is only necessary further to inquire if the title shown by the defendants, in Boggiss and Randle, is superior to that exhibited by the plaintiff. And here we may remark, that as the defendants have assumed the character of lessees, they are in no condition to assert, the lessor had no title at the commencement of their tenancy. [Com. on L. & T. 519.] Conceding however, they are permitted to show that other persons have lawfully excluded them from the possession, and that the license to Boggiss and Randle, was sufficient, if not rebutted by other proof, we think the title of the lessor is abundantly sustained by the sworn admissions of the defendants, contained in their answer to the suit, the exemplification of which they gave in evidence. It is supposed, because this was offered for the specific purpose of showing the allowance of the injunction, that the plaintiff cannot use the answer for any other purpose, although it contains an exhibit showing the regular grant of a license for this ferry to Gunter by the commissioners' court of Jackson county, which once extended over the situs of the ferry. The general rule is, that admissions of the contents of a writing, or record, are not admissible to prove its existence or contents, unless made for the purpose of the trial, but the sworn answer of a party to a bill in chancery is an exception to this rule. [Greenl. Ev. § 97.] We are unable to perceive the least error in the rulings of the court below, and its judgment is therefore affirmed.

SANDERS v. FISHER & PHELPS.

1. A garnishee who had discharged the judgment, being sued on the original debt, for the use of another, employed as counsel to defend the suit, the same attorneys who had obtained the judgment against him as garnishee, but did not inform them of his defence, in consequence of which, a second judgment was rendered against him for the same debt: *Held*, that this was gross negligence, and that chancery could not relieve him.

Error to the Chancery Court of Perry.

THE bill was filed by the plaintiff in error, and alleges that some time in the year 1838, one L. ton Sanders sued out an attachment against James Fisher, who had been a citizen of Perry county, but had left the State, and summoned him as garnishee. That he appeared and answered, that he was indebted to Fisher in the sum of \$612 50, for which sum, besides costs, a judgment was rendered against him at the February term, 1839, of said court. That shortly after the judgment was rendered against him, he paid the amount in full to L. ton Sanders, but afterwards discovered that the clerk had failed to enter the judgment, and which at his instance was afterwards, at the spring term, 1842, rendered *nunc pro tunc*.

That Fisher, after the service of the garnishment, transferred the said note to one Esther Phelps, and upon which complainant was sued in his name, for her use, at the spring term, 1839, of Perry circuit court. Complainant employed attorneys to defend the suit, and informed them the suit was in the name of Fisher, but omitted to inform them it was brought for the use of Esther Phelps, and a second judgment was rendered for the same debt, at the fall term Perry circuit court, 1839.

The bill also alleges that Esther Phelps is the wife of Fisher, Phelps being her maiden name, or the name she bore before she was married, and that the transfer was fraudulently made, and in law remained his property after, as well as before

the transfer. That the judgment was permitted to be obtained, by the mistake of complainants attorneys, and of this fact the attorneys of Esther Phelps have been informed; yet they are still endeavoring to collect the debt a second time, &c. The bill prays an injunction, which was granted.

Affidavit being made of the non-residence of Fisher and Esther Phelps, publication was ordered and made, and a decree *pro confesso* entered.

At a subsequent term, on motion of defendant's counsel, the court dismissed the bill, considering that no sufficient reason was shown for not making defence at law.

From this decree this writ is prosecuted, and is the matter now assigned as error.

A. B. MOORE, for plaintiff in error.

1. To enable a defendant at law, to defend upon the ground of a former recovery against him as garnishee, at the suit of a third person, he must show a judgment upon record, if in a court of record, and that such judgment has been by him paid and satisfied. [See *Cook v. Field*, 3 A. R. 53; *Johns & Cole v. Field*, 5 A. R. 484; 2 Story's Eq. 657.]

2. A mere memorandum of the judge, on the trial docket of the court, would not have been such a judgment as would protect the garnishee, in a suit at law, by the payee or holder of his note.

3. It is evident, from the facts stated in the bill, that the complainant did not know of the defect in the judgment, until after a judgment had been obtained against him on his note, and if he had, it was not legally in his power to have a judgment entered *nunc pro tunc*.

4. If the complainant had a remedy at law, the fraudulent transfer of his note by Fisher to his wife, in the name of Esther Phelps, by which he was misled in the title of the cause, and caused him to mislead his attorney, is a sufficient excuse for not making it.

5. The bill, though inartificially drawn, should not have been dismissed for want of equity.

DAVIS, contra. The bill contains no equity.

1. The ignorance as to the name of the plaintiff is gross,

is no excuse for not defending at law. [French v. Garner, 7 Porter, 549.]

2. The complainant admits a judgment was obtained against him, and that he paid the amount to the plaintiff, but does not alledge that the court had jurisdiction either to entertain the attachment against Fisher, or that it had given judgment against Fisher to sustain the judgment against the garnishee. This should be shown in order to guard defendants in attachments from collusion, as well as garnishees.

3. It is not shown in what respect the judgment *nunc pro tunc* differed from the first judgment; and if so, no new rights accrued to complainant, and was made long after the enjoined judgment had been rendered.

4. If the proceedings at the time of payment did not authorize such payment, the subsequent change in the entry could not, and the plaintiff in garnishment might be made to refund.

ORMOND, J.—The case made by the bill, entitles the party to the relief he seeks, if he has not forfeited the right by his negligence in not making his defence at law, when again sued for the debt, which as garnishee he had paid.

The only excuse made for not defending the case at law is, that he omitted to inform his attorneys that the suit was for the use of Esther Phelps, and that “therefore a second judgment was rendered against your orator for the same note.” There is no allegation that he informed his attorneys what his defence was to the note, or that he had any defence whatever to make. It is to be sure stated, that they were the same persons who obtained the judgment against him as garnishee, and whom he afterwards employed to have a judgment against him as garnishee, rendered *nunc pro tunc*. But he had no right to suppose that they would voluntarily interpose this defence. It was his duty to be active; not only to inform them of his defence, but to furnish them with the means of making it. Putting the most favorable interpretation upon the allegations of the bill, the case presented is one of gross negligence.

It is exceedingly painful thus to witness the triumph of fraud, but if parties will not attend to their interests, but will,

by gross and supine neglect, permit a judgment to be rendered against them, it is not in the power of a court of chancery to relieve them, without breaking down all the bulwarks which separate the two jurisdictions. We cannot give relief in this case, without overruling an unbroken series of decisions, holding that equity will not interfere against a judgment at law, unless the party seeking relief was prevented from obtaining it in the proper forum, by fraud or accident, or by the act of the opposite party, *unmixed with fault or neglect on his part*. [French v. Garner, 7 Porter, 49.] This decision has been repeatedly followed since, and under very strong circumstances has been unflinchingly adhered to, from a thorough conviction of the wisdom, not to say the absolute necessity of the general rule, though like all other general rules, it may appear to operate harshly in particular cases.

This case falls fully within these principles, as no reason whatever is shown for not making defence at law. Let the decree be affirmed.

MOORE v. PONDERS.

1. Where the defendant, the maker of a promissory note introduced a witness who stated that there was no consideration passing from the plaintiff, the payee, and that the latter was unknown to the former, it is competent for the plaintiff to ask the witness, if the note was made at the instance of a third person, and whether there was any consideration passing from that person to the maker, on which the note was founded, and what it was.

Writ of Error to the Circuit Court of Lawrence.

THIS was an action of debt, at the suit of the plaintiff in error, on a promissory note made by the defendant and another person, on whom process was served. On the trial, the plaintiff read to the jury the note declared on, and the de-

defendant then introduced a witness, who stated there was no consideration passing from the plaintiff, the payee, to the makers for making the same, and that he was unknown to them. The plaintiff then asked the witness whether the note had been made at the instance and request of Patrick O'Neal, whether there was any consideration passing from O'Neal to either of the makers, on which the note was founded; if so, what was the consideration? To this question the defendant objected, and moved the court to exclude any answer, unless the plaintiff could show that "Moore was privy to the same." The objection was sustained, and the witness not permitted to answer: Thereupon the plaintiff excepted, and his exceptions duly sealed and certified. A verdict was returned for the defendant, and judgment rendered accordingly.

W. COOPER, for the plaintiff in error, to show that the ruling of the circuit court could not be supported, cited *Bird v. Daniel*, 9 Ala. Rep. 302; 2 Camp. Rep. 36; 3 Id. 320; 8 Mass. Rep. 103; 17 Id. 575; 1 Johns. Rep. 215; 7 Id. 103; 8 Id. 149; 12 Id. 276.

T. M. PETERS, for the defendant, cited 1 Phil. Ev. 131; 6 Ala. Rep. 390, 407, 509; 7 Id. 457; 1 Poth. on Con. 2; Chit. on Con. 3, 4; 1 Salk. Rep. 27; 5 East's Rep. 10; 3 Scott's N. Rep. 121; 4 Id. 77; Noys Max. 24; Broom. Max. 218, 336, 341, 342; 2 Bla. Com. 445; 1 Vent. Rep. 6, 318; 2 Siderf. Rep. 158; Stra. Rep. 592; 2 Queen B. Rep. 859; 4 B. & Ald. 433; 11 Meeson & W. Rep. 641; 8 Id. 790; 7 Id. 633; 5 A. & Ellis' Rep. 548; 4 Scott's N. Rep. 509; 3 Id. 753; 1 Id. 52; 1 Wheat. Selw. N. P. 38, *et post*; 2 Poth. on Con. 20; 3 Co. Rep. 80; 5 Bac. Ab. 332, notes; 4 East Rep. 75; 2 Dall. Rep. 242.

COLLIER, C. J.—It may well be questioned, whether the fact that the payee of the note was unknown to the makers, and that no consideration moved from him to them, was sufficient to show the want of consideration. But how-

ever this may be, it was clearly competent for the plaintiff to show, that although this was literally true, yet the makers were indebted to some third person, and made the note in question in lieu of that indebtedness. If such proof had been made, we can perceive of no objection to the plaintiff's recovery. The substitution of one creditor for another, by the express consent of the defendants, was permissible, and the promise to pay the substituted creditor by note, created a privity between the payee and the makers. If the latter were absolved from their indebtedness to O'Neal by undertaking to pay the plaintiff an equal sum, it is difficult to perceive any foundation for the assumption, that their promise was gratuitous. It is perfectly clear, that as to them it was not a mere *nudum pactum*.

As it respects the makers of the note, it was competent for O'Neal to have made a donation of his demand against them to a third person; and if they recognized such donee as their creditor, by making a note payable to him, they cannot resist its payment by proving that they received no equivalent from the payee. If the donation was in fraud of the rights of creditors, it would be for them to assert their claims, and ask that the demand be subjected to their payment. And if O'Neal had no creditors, the gift would certainly be good against all the world.

Had the examination been allowed to proceed, perhaps the plaintiff would have shown that O'Neal was his debtor, and if this was material, in the order of progression, he should have been allowed, first, to prove that O'Neal was a *bona fide* creditor of the makers. The question proposed to the witness was not *prima facie* inadmissible, but a direct response may have formed a link in the chain of testimony by which the plaintiff proposed to countervail the defence. In every view in which the case has presented itself to us, we are of opinion that the ruling of the circuit court cannot be sustained. The judgment is consequently reversed, and the cause remanded.

STARKE & MOORE v. KENAN, EX'X.

1. The admission by the attorney of record of a fact for the purpose of trial, binds his client, and is conclusive of the fact admitted.
2. In a suit by two as late partners, it is admissible for the defendant on the general issue to prove that no partnership existed at the time of the contract. The effect of the act of 1839 (Dig. 324, § 68,) is to revive the rule declared in *Davis v. Smith*, 2 Stewart, 222, and overruled in *Hunley v. Lang*, 5 Porter, 154.
3. Declarations by one of two joint partners, that the other was not his partner at the time of the alledged contract, is admissible evidence.

Writ of Error to the County Court of Dallas.

ASSUMPSIT by Starke & Moore on the common counts, against Mrs. Kenan, as the executrix of the estate of M. J. Kenan, deceased. The defendant pleaded, non-assumpsit, payment, and non-claim.

At the trial, the plaintiffs put in evidence tending to establish their demand, and then closed their evidence. The defendant then offered to introduce an agreement, in these terms: "In this case I agree to admit that the said Starke & Moore were not partners at the time of the alledged sale to the defendant's testator, and that this may go the jury as evidence, if the court decides that under the pleadings it is competent." This was signed by the plaintiff's attorney, and was admitted by the court against the plaintiff's objection.

The defendant next offered one M. J. Kenan as a witness, who stated he was the son, and had been a legatee of the testator, but had released his interest in the estate to the defendant. The release was then exhibited, signed by the witness, purporting to be for the consideration of \$5000, secured to be paid by the defendant. He also stated the release was made for the express purpose of rendering him a competent witness—that the consideration of the same was a note for that sum, executed to him by the defendant. On

this proof, the plaintiffs objected to the witness as incompetent, but he was allowed by the court to testify. On his examination, he was asked what he heard the plaintiff, Starke, say on the subject of a partnership between Moore and himself, at the time of the sale of the goods for which the suit was brought; also what he heard Starke say as to the payment and satisfaction of the claim sued for. The plaintiffs objected to this evidence, but were overruled by the court. The witness answered, that in February before the trial, Starke told him he and Moore were not partners at the time of the sale referred to, and that he sold the goods individually, as well as that the debt had been settled before suit—that Starke & Moore were unfriendly, and their partnership, if any ever existed, had been dissolved before this suit was brought.

The court charged the jury, that the agreement above set out was conclusive evidence against the plaintiffs on the question of partnership at the time of the sale referred to. There was other evidence before the jury tending to contradict the admission, and to show there was a copartnership.

The plaintiff excepted to the several rulings of the court against him with relation to the evidence, and also to the charge above stated. The assignment of error opens the entire bill of exceptions, which also contains a recital of certain proceedings of the court with reference to one of the jurors, who became sick or uncomfortable during the time the verdict was being considered, but which are unnecessary to be stated here, as no point was made upon them at the argument, and because the judge certifies that no objection was taken to the course pursued.

PECK, for the plaintiffs in error, insisted—

1. The agreement of the attorney was improperly admitted—1. Because not such a one as in that capacity he was authorized to make. 2. Because the proof was not competent under the pleadings in connection with the statute. [Dig. 324, § 68.]

2. The witness admitted was incompetent. [Houston v. Prewitt, 8 Ala. Rep. 846; Powell v. Powell, 7 Ib. 582; Lock v. Noland, Jan. term, 1847.]

3. The declaration of Starke was not admissible to disprove the partnership.

4. The agreement of the attorney, if admissible, was not conclusive.

EDWARDS, contra:

GOLDTHWAITE, J.—1. It is said admissions made by attorneys of record bind their clients in all matters relating to the progress and trial of the cause. But to this end they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases they are in general conclusive. [Greenl. Ev. 218, §186.] The written agreement in this case seems entirely within the rule just quoted, and manifest injustice might arise by permitting the party making the admission for the purpose of trial, from afterwards disputing the admitted fact. The only limitation affixed to the admission is, that the court should rule the fact to be competent under the pleadings. The competency of such a fact was settled when this case was here at another term, (see 6 Ala. Rep. 773); yet as the opinion then determined seems to be somewhat misunderstood by the plaintiff's counsel, we state the reasons which induced it more at large than they are stated in the report.

2. It is difficult to understand what precise mischief the section of the act of 1839 bearing on this point was intended to reach, but clearly it was not the intention to put a defendant upon the denial of the fact of partnership, when the suit is by plaintiffs assuming a firm name; as this would be equivalent to allowing plaintiffs to recover in many cases where the fact would be apparent from their own proof, that some of them had no interest in the cause of action. The plaintiff, in all suits not evidenced by writing, is required to prove his case, and it would be a strange anomaly if a recovery could be had in the names of two or more, when the proof was satisfactory that one of them had no interest whatever in the contract, and that it was not made with him. The statute however, war-

rants no such inference. It directs that where plaintiffs shall bring suit as a firm or partnership, it shall not be necessary for proof to be made that the individuals named as plaintiffs constitute the members of the firm, unless the defendant puts the same in issue by plea in abatement. [Dig. 324, § 68.] The object of this statute seems to be to revive a rule which was held in the case of *Smith v. Hunt*, 2 Stew. 222, but which was afterwards overruled in *Hunley v. Lang*, 5 Porter, 154. In the first of these cases, the suit was by one as surviving partner, and no other proof was given of the partnership or death than grew out of a note payable to the deceased partner, & Co. The court held this was sufficient, and that it rested with the defendant either to plead the fact of no partnership in abatement, or to prove it at the trial under the general issue. In the latter case we considered it the true rule that the plaintiffs suing on a note payable to one of them, & Co. were required to prove that they constituted the firm, as alledged in the pleadings. The difficulty of giving any other construction to the statute than a literal one, arises out of the fact that the insertion of the name of one as plaintiff having no connection with the contract, will entirely change the rights of the parties in relation to set off, and in the event of the death of the party having the actual interest, would transfer it to a stranger. Independent of this, it is inconceivable to us that the law should require the plaintiff to prove his cause of action, (as it does when the action is on an unwritten contract,) and yet require a verdict to be rendered on one entirely distinct from that asserted. In our judgment the utmost effect of the statute is to revive the rule asserted in *Davis v. Smith*, so far as it is not in conflict with *Hunley v. Lang*. This being the effect of the statute, it is within that decision that the defendant might probably show, as we said when this cause was here before, that the promise was to a single individual, and not to the partnership.

3. With regard to the evidence offered of admissions by Starke, that no copartnership existed between himself and Moore, and also that the demand sued for had been settled, we can perceive no substantial objection to their admissibility. The general rule admitting the declarations of a party to the record, applies to all cases where the party has any in-

terest in the suit, whether others are joint parties on the same side or not, and howsoever the interest may appear. [Greenl. Ev. § 172.] If in this case it had been shown the apparent interest of Starke in this controversy had been assigned to the other plaintiff, a different rule, or rather an exception to it, might obtain, but in the absence of any such proof, we think the declarations properly admissible.

The conclusiveness of the admission by the attorney of record has been previously considered, and the question growing out of the release is settled by the decision of Hall v. Alexander, 9 Ala. Rep. 219, in accordance with the ruling below.

We have only to add, that there is no error in the record. Affirmed.

BOYD & MACON v. McIVOR.

1. The court cannot instruct the jury as to the effect of evidence, which is doubtful or contradictory.
2. Where suspicion is cast upon a mercantile security, the holder must prove that he gave a valuable consideration for it, and acquired it before it was dishonored.

Writ of Error to the Circuit Court of Macon.

ASSUMPSIT by the defendant in error, as indorsee of a note, made by the plaintiffs in error, on the 18th February, 1841, for the payment, on the first February 1842, to Geo. Goldthwaite, of \$400, negotiable and payable at the Branch Bank of Montgomery.

The defendants pleaded *non-assumpsit*, payment, and set off.

Upon the trial, as appears from a bill of exceptions, the plaintiff offered the note, which was indorsed in blank, by

the payee, without recourse, and without date. The defendant then proved by a witness, that in the month of February, 1841, at the request of one Robert H. Goldthwaite, he, the witness, visited a plantation known as the McIvor plantation, to value certain improvements on the plantation, for the purpose of ascertaining the amount to be paid to the said Boyd for the same, as stated by said Robert. It was further stated by the witness, that the initials, "R. H. G." on the face of the note, are in the hand-writing of Robert H. Goldthwaite. That at the time he valued the improvements R. H. Goldthwaite stated he was acting as the agent of Geo. Goldthwaite. That Boyd lived on and cultivated the McIvor land in 1841, and R. H. G. informed witness, at the time of the valuation, that Boyd was to be allowed the value of the improvements, not exceeding two hundred dollars, and they were valued at that sum, or more, and the result reported to R. H. G.

In the spring of 1842, the witness walked into the law office of George Goldthwaite, in the city of Montgomery, and discovered him and defendant, Boyd, making calculations, &c. Some warehouse receipts were turned over by Boyd, to Goldthwaite, and a calculation made of the amount. Witness heard Boyd tell Goldthwaite, you have calculated the cotton at one cent below the market value, and it overpays you some sixty dollars, pay me that sum. Goldthwaite replied, when the cotton is sold, we can settle the whole business. The witness understood from the parties, that the cotton was turned over, as collateral, to an indebtedness from Boyd to Goldthwaite, for the rent of the McIvor lands—but witness heard no mention of the amount, or form of the debt, or the amount of the cotton.

Defendant, Boyd, offered to deposit with the clerk of the court, subject to the order of the court, a sum of money sufficient to pay the note sued on, interest and costs, and to introduce his co-defendant, Macon, as a witness, stating that Macon was but a surety to the note; but on plaintiff's objection, the court rejected the proposition, and charged the jury, that if they believe all the evidence, they must find for the plaintiffs.

The charge of the court is now assigned as error.

W. P. CHILTON, for plaintiff in error.

The court had no power to decide upon the facts, and take the determination of the case from the jury. [Pistole v. Street, 5 Por. 64; Huff v. Cox, 2 Ala. 312; Vaughan v. Wood, 5 Ala. 305; Clemens v. Loggins, 1 Id. 622.]

The jury might have inferred from the proof, that George Goldthwaite was but the agent of McIvor, in taking the note, and if so, he could not, by making it payable to himself, and indorsing it without consideration to his principal, "without recourse," prevent the defendant from having the benefit of the payment, if the jury should believe that the cotton was intended to pay his debt.

By the rules of the law merchant, the indorsee must have the bill protested, to hold the drawer liable, unless he shows no funds in the hands of the drawee. This note has not been protested.

BELSER, contra. The legal presumption, in the absence of proof, is, that the note was indorsed before its maturity, and this shuts out the entire defence. [Pinkerston v. Badley, 8 Wend. 600; Webster v. Lee, 5 Mass. 329; Stewart v. Greenleaf, 3 Day, 311; Pond v. Lockwood, 8 Ala. 674.]

There was no proof of the agency of R. H. Goldthwaite, and his acts and declarations were not admissible. [1 Yeates R. 502; 1 W. C. C. R. 320.]

The charge of the court did not deprive the jury of any right. [Randolph v. Carlton, 8 Ala. 607; Smith v. Houston, Id. 737; Armstead v. Thomas, 9 Ala. 586; Sims v. Sims, 2 Ala. 117.]

ORMOND, J.—We do not consider it necessary to determine whether such a case as this, is one in which the court would compel the defendant to join in a demurrer to evidence, because, conceding it be such, the court erred in its judgment. We have made the preceding remarks, because it is by analogy to a demurrer to evidence only, that such a charge as the present can be sustained.

No question arises upon this writ of error, of the propriety of the admission of the declarations of R. H. Goldthwaite, that he was the agent of his brother. We must therefore

consider the fact as proved, that R. H. G. was authorized by George Goldthwaite to act as his agent, in ascertaining the value of some improvements made by the defendant on the McIvor plantation, which he had rented, and it was fully proved that these improvements amounted to \$200, which sum the agent stated was to be a credit upon the amount to be paid as rent.

It is not shown how much the rent was, nor is it shown that this note was given for the rent, but it bears date about that period, is payable to G. Goldthwaite, who, from the proof, it appears assumed to act for McIvor, in relation to the rent of the plantation, as he delegated his brother to ascertain the amount of the improvements, which was to be allowed as a credit against the rent. The note in suit was once in the possession of R. H. G., as the initials of his name, in his hand-writing are found upon it. And this note is afterwards put in suit by McIvor, to whom it has been assigned *without date and without recourse*, by the payee. We will not say that this array of circumstances, unexplained, would compel a jury to infer that this note was given for the rent of the McIvor place, and was entitled to a discount of \$200, for the improvements made by the tenant, but if the jury had so found, no court should have granted a new trial, and it follows that a court assuming to pass upon the effect of the evidence, was unauthorized to say, that a jury must have found for the defendant.

The facts proved in regard to the payment in the office of the payee of the note, shortly after its maturity, would be conclusive if the suit were now in the name of the payee, and the facts were not explained by him, so as to relieve the case from the natural and legal inference, that it was a payment of the note.

It is contended, that as the note is payable in bank, and therefore under our statute to be governed by the commercial law, and as the presumption arising from the blank indorsement is, that it was transferred before it was due, no evidence of set off or payment as against the payee is admissible. This is doubtless the general rule. Waiving for the present the consideration of the question, whether this

note was taken by the payee as the agent of McIvor, (if it be so found by the jury,) and whether in such a case a payment to the agent before notice of the transfer to the principal, would not be good, and considering it merely as a mercantile security, we think the circumstances attending the transaction, cast such a suspicion over it, as to require the indorsee to prove that he gave a valuable consideration for it, and acquired it before it was dishonored. [Thompson v. Armstrong, 7 Ala. 256.] In this aspect of the case, and under the proof as it was before the jury, the court should have instructed them to inquire, first, whether the defence of payment and set off were made out by the proof, and if so, that then the plaintiff could not recover without proving himself a *bona fide* holder.

It is not necessary to protest an inland bill of exchange to enable the holder to sue. The only effect of the protest is, to entitle the holder to damages. [Leigh & Co. v. Lightfoot, at the present term.] Let the judgment be reversed, and the cause remanded.

WALL v. WILLIAMS, USE, &c.

1. It is not allowable to ask of a witness whether an Indian of the Choctaw tribe became a citizen of Alabama after the laws of the State were extended over the Choctaw territory. A direct answer to such a question is a conclusion of law, which the court should decide from the facts proved.
2. Where a deposition contains a question and answer which discloses illegal testimony, it may be objected to on the trial; but where the objection is to the entire deposition, on a ground that it does not question the competency of the witness, the admissibility of the facts disclosed, or show that it had not been taken in conformity to the statutes, it seems that a motion should be made to suppress it before the cause is put to the jury.
3. The 9th section of the act of 1832, which requires that on contracts made with an *Indian*, the consideration shall be proved by two credible wit-

nesses, extends not only to Indians of the full blood, but to the descendants of an Indian woman and a white man.

4. Marriages among the Indian tribes must generally be considered as taking place in a state of nature, and if according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract; and either party may take advantage of this term, unless it be expressly or impliedly waived by them, or they may perhaps acquire such relations to society as will give permanency to the contract, and take from them the right to annul it.
5. The act of 1832 extending the jurisdiction of this State over the Indian territory does not take from a marriage between members of the Choctaw tribe its dissoluble quality at the pleasure of the parties: nor can the asking a reservation under the treaty of Dancing Rabbit Creek, the acceptance of a patent from the United States for the land embraced by it, and the continued cohabitation in this State for more than five years after the ratification of the treaty, and the departure of the mass of their tribe to the west, have that effect. The concurrence of all these facts will not take from a reservee, his citizenship as a Choctaw—the treaty securing the right of resuming his *status* in the tribe at pleasure: nor will it warrant the assumption that the marriage was consummated in contemplation of a residence in Alabama.

Writ of Error to the Circuit Court of Sumter.

THE defendant in error declared against the plaintiff in assumpsit on a promissory note, dated the 18th October, 1837, by which she promised to pay him on or before the first day of January next thereafter, \$133 75. The defendant pleaded—1. Non-assumpsit. 2. That the plaintiff ought not to have and maintain his action, &c. because she says that at the time of making the several supposed promises and undertakings in the declaration mentioned, she was the wife of one David W. Wall, to wit, &c.; and this she is ready to verify, &c. To the second plea, the plaintiff replied that the defendant became the wife of said Wall under the usage and customs of the Choctaw tribe, and while subject to such usage, and in the territory then occupied by said tribe, and before Alabama had extended its jurisdiction over them; and by such usage the wife was entitled to contract as a *feme sole*. That at the time of bringing this action, the said Wall

had abandoned the defendant and left the country, and gone to his tribe without the intention of returning. Whereby the plaintiff avers that by the said usages and customs of said tribe, defendant became a *feme sole*. The defendant rejoined that after the marriage of the parties as aforesaid, according to the Choctaw usages, the said tribe removed west of the Mississippi, and the said Delila and David remained in the said county of Sumter, and became citizens of the State of Alabama, and lived under its laws as man and wife, and have never been divorced. To this rejoinder the plaintiff demurred, and his demurrer was sustained by the court. Thereupon the defendant again rejoined, admitting that the marriage was made as stated in the plaintiff's replication, and traversing the residue. She alledged further, that she became a citizen of the United States under the 14th article of the treaty of Dancing Rabbit Creek, and a citizen of the State of Alabama; and was, and still is the wife of David W. Wall. To this rejoinder the plaintiff also demurred and his demurrer was sustained. An issue was then formed on the replication, and the cause was thereupon submitted to a jury, who returned a verdict for the plaintiff, and judgment was rendered accordingly.

From a bill of exceptions sealed at the defendant's instance, it appears that the defendant lived in the Choctaw nation in 1828, was the daughter of a full blood Indian woman and a Frenchman—Wall was one-fourth Indian, and himself and defendant lived together as husband and wife from 1831 until seven or eight years preceding the trial below; when he killed a man, and to avoid a prosecution, left the county and went to his tribe west of the Mississippi, and has never returned. But defendant has received letters from him, in which he threatened to return and take away her child. Defendant lived in 1842 or '3, where she did in 1828.

Another witness introduced by the plaintiff, stated that he had inquired into and informed himself as to the laws and customs of the Choctaws. The tribe had no written laws. They married and unmarried at pleasure—a man frequently having several wives. When a man found a woman he wished to marry, he made her a present of a blanket and she

became his wife—when he wished to dissolve the marriage, he abandoned her. The husband took no part of the wife's property by the marriage, and she retained all the rights of a *feme sole*.

It was admitted that the defendant and David W. Wall belonged to the Choctaw tribe, and both obtained reservations of land under the treaty of Dancing Rabbit Creek.

The defendant then offered a patent from the United States, dated 18th December, 1842, conveying to herself and children certain lands under the 14th article of the treaty of Dancing Rabbit Creek. She also read the deposition of one Brashear, stating that the marriage of herself and Wall was considered valid in all respects among the Choctaws—the tribe having jurisdiction at that time over the territory where it took place. Parties were sometimes married according to the laws, usages and customs of the Choctaws by a justice acting under the laws of the United States, sometimes by a captain, parson, or merely by consent of parents. That defendant and Wall lived together as man and wife about eight years, until July, 1839, and within half a mile of Moscow, Sumter county, Alabama. The deposition contained a question and answer, to which the plaintiff objected, as follows: "Did or did not the said D. Wall and Delila Wall become citizens of Sumter county, after the laws of the State of Alabama were extended over the Choctaw territory, which now constitutes Sumter county?" *Answer.* "The said David W. and Delila Wall became citizens of Sumter county, Ala." The objection was sustained, the question and answer ruled out, and thereupon the defendant excepted.

The defendant then introduced the deposition of another witness, who stated that he was acquainted with the law of marriage among the Choctaws up to 1833; that they were sometimes married by a minister, sometimes by a Choctaw ceremony, and sometimes a man and woman took each other (without ceremony), lived together and were considered man and wife. Marriages were also solemnized by a justice of the peace from an adjoining county. Witness was acquainted with D. W. Wall from 1823 to 1839, at different places, and at his late residence in Sumter county—the defendant had been known to him since 1829—she then lived at the

same place in Sumter county where she continued to reside up to 1844. Defendant and Wall were considered *husband and wife* by the Choctaws and other persons residing among them; but there was no evidence that they had ever been naturalized according to the laws of the United States in respect to foreigners.

The court charged the jury—1. That the act of 1832, which required the consideration of contracts made with Indians to be proved by two credible witnesses, applied only to contracts made with Indians of the full blood; and consequently did not embrace the present case. 2. That a married woman was incapable of making a contract, so as to make herself liable; that, if the defendant and D. W. Wall were married according to the laws and customs of the Choctaws, the marriage would be regarded as valid in this State; but if by those laws and customs a married woman may contract as a *feme sole*, and she made the note sued on, she was bound by it, and liable for its payment. So, if by those laws and customs, the defendant and D. W. Wall could dissolve the marriage at pleasure by abandonment, and D. W. Wall did abandon the defendant and dissolve the marriage before defendant made the note, then she was bound to pay it. That although the marriage might be valid according to the usages of the Choctaws then in force in their nation, yet the wife had the capacity to contract: *provided*, that under the Choctaw laws, she retained her property and the rights of a *feme sole*; and she was liable to be sued as a *feme sole*, if the marriage was dissolved. If the marriage was dissoluble at the pleasure of the husband, its dissolution might be inferred from the abandonment by the husband, and going to his tribe beyond the Mississippi, or elsewhere.

The defendant then prayed the court to charge the jury as follows: 1. If the defendant became a citizen of the United States by the 14th article of the treaty of Dancing Rabbit Creek, the laws and customs of the Choctaws were as to the defendant thereby abrogated, during the time that she continued to reside in this country; and her rights as a married woman became subject alone to the laws of this State and the United States. 2. If the defendant became a citizen of the United States, as supposed by the first prayer, and was

the wife of D. W. W., she was entitled to all the rights, and subject to all the incapacities of a married woman; and incapable in law of making a promissory note that would be binding upon her. These charges were refused by the court, and the jury were further instructed, that the defendant became a citizen of the United States by conquest of the Indian territory, and by the provisions of the treaty of Dancing Rabbit Creek, without herself or her husband ever having been naturalized. Yet the citizenship which the defendant thus acquired did not incapacitate her, if by the laws and customs of the Choctaw nation under which she became the wife of D. W. W., she was capable of making a contract. To all which rulings, and charges given and refused, the defendant excepted, &c.

J. HAIR, HOIT, and S. W. INGE, for the plaintiff in error, made the following points: 1. The rejoinder to the replication is a good answer to it. [1 Chit. Plead. 680-1.] 2. The replication is a *departure* from the declaration, in relying on usages, customs, &c. of the Choctaws, instead of setting up matter of avoidance at common law. [1 Chitty's Pl. 681; 2 Saund. Rep. 840; 20 Johns. Rep. 163; 1 Cow. Rep. 319; 14 Mass. Rep. 103.] *Departure* is matter of substance reached by general demurrer. [1 Chit. Pl. 686; 2 Saund. Rep. 84, note 1; 1 Wils. Rep. 122; 2 Id. 96; 4 T. Rep. 504; 2 Caine's Rep. 320, 329; 16 Mass. Rep. 1; 14 Johns. Rep. 132; 20 Id. 163.] The replication does not answer the plea of coverture; [1 Chit. Plead. 612; 8 T. Rep. 545; 15 Mass. Rep. 31;] and the demurrer should have been visited upon it. [1 Chit. Plead. 707; 1 Saund. Rep. 285, note 5; 8 East Rep. 442; 5 Cranch's Rep. 257; 2 Johns. Rep. 366; 7 Cow. Rep. 46.]

3. The second rejoinder, filed after the demurrer was sustained to the first, is clearly good—the objection that it contains matter of confession, traverse and avoidance, is only ground of special demurrer. [1 Chit. Plead. 515, 642; 1 Saund. Rep. 337, note 3; Com. Dig. Pleader, E. 2; Bac. Ab. Pleas, K. 1; 1 Bos. & P. Rep. 415; 2 Johns. Rep. 433; Clay's Dig. 334, § 119.]

4. The act of 1832, which requires the consideration of

contracts made by *Indians* to be proved, applies not only to Indians of the *full blood*, but to those of *mixed* blood also. [Clay's Dig. 272.] The terms of the statute are general, and it should not be limited by construction.

5. The defendant and her husband became citizens of Alabama under the treaty—they received reservations under it, and a patent issued to the defendant. An Indian may be made a citizen by treaty. [Cons. U. S. art. 2, § 2; art. 6; 6 Pet. Rep. 515.] By accepting a patent from the United States, the defendant signified her assent to become a citizen thereof, and Alabama having taken possession of the territory pursuant to treaty, took it with all the incumbrances imposed by the treaty, and cannot deny the citizenship acquired by the Indians under its stipulations. [4 How. Rep. (Miss.) 522, 555, 559 to 563; 2 Yerg. Rep. 421, 428-9, 454; 5 Id. 326 to 329.]

6. The marriage of defendant and D. W. W. was contracted with a view of being continued in Alabama—the six months provided by the treaty for signifying their assent to become citizens of the United States, had previously expired. [Story Confl. of Laws, § 199, 229; 2 Yerg. Rep. 438, 454; 5 Id. 326.] The condition of a married woman is regulated by the law of the domicil. [Story's Confl. of L. § 18 (1), 50 to 55, 64, 66 (a), 69, 70, 103, 181, 187 (5), 189 (7), 190 (8). See also p. 188; 2 Kent's Com. 459.]

7. The abandonment of the defendant by D. W. W., did not dissolve their marriage—such a mode of dissolution is opposed to the laws of this State. [Story's Confl. of Laws, § 221, 222, 223, 224, 225, 189, 226 (a. & b.) 228, 229, 322. See also p. 188, note; 2 Clark & F. Rep. 488, 520.]

8. The objection to the question and answer in Brashear's deposition came too late, at the trial. [9 Ala. Rep. 744.] The last charge given lays down the law incorrectly, in assuming that the defendant became a citizen of the United States by conquest of the Indian territory. [6 Peters' Rep. 515.]

R. H. SMITH, for the defendant in error, insisted that the replication was sufficient to avoid the plea of coverture; [2 Kent's Com. 157, note; 3 Ala. Rep. 537; 9 Id. 855;] but

the rejoinder does not answer the replication. If there was an abandonment by the husband, it is not necessary that there should have been a divorce. The amended rejoinder is bad on general demurrer; because it confesses, traverses and avoids. [5 Ala. Rep. 490; 7 Id. 17.] But if the demurrers were improperly sustained, the defendant has not been prejudiced. Coverture is admissible under the plea of *non-assumpsit*, (1 Chit. Plead. 469, 470;) and the bill of exceptions shows that proof of it was admitted at the trial. So that the defendant has had the full benefit of his defence, and cannot object to the insufficiency of the replication, or complain that his rejoinders have been adjudged bad. [4 Ala. 230.] The capacity of the defendant to contract, or the effect of her marriage must depend upon the law of the place where she was married. [8 Ala. Rep. 48.] It is apparent from the proof that she was not incapacitated by the marriage; and if she was, her competency we have seen, was restored by the abandonment of her husband.

It is not perceived that the question of citizenship is a material point in this case. But however this may be, it is clear that the treaty did not make her a citizen; it only entitled each Indian who desired to remain and become a citizen, to a reservation of lands, for which, after five years, they might receive a grant. This only conferred one of the rights of citizenship—that of holding lands.

The part of the testimony of Brashears which was excluded was incompetent, and the case from 9 Ala. Rep. 744, does not require an objection to a deposition under such circumstances to be made previous to entering upon the trial. But this question need not be pressed, as the charge of the court proceeded upon the hypothesis that the fact which the rejected answer affirmed, was proved.

The act of 1832 does not apply to an Indian who abandons his tribe and leads a civilized life. It is clearly indicated by the 4th and 9th sections, taken together, that the legislature intended to distinguish between "Indians, and persons of mixed blood descended of Indians."

COLLIER, C. J.—The question proposed by the defend-

ant below, to her witness, Brashears, and his answer thereto, were rightly excluded by the circuit court. It is the province of a witness to narrate facts, and for the judge to decide the law arising upon them. But here the inquiry addressed to the witness required him to state, what was the *status* of the defendant and her supposed husband—a conclusion of law depending upon facts; the fact was matter of proof, but the effect of it, was referable to the court. The case of *Spence v. Mitchell*, 9 Ala. Rep. 744, is unlike the present; there an objection was for the first time made *at the trial*, to the admissibility of a deposition, on the ground that all the questions proposed to the witness were not fully answered. We held, that as the deposition was regularly taken, the witness competent, and the facts disclosed admissible, the motion to suppress came too late. [See also, *Carter v. Manning & Jackson*, 7 Ala. Rep. 851.] In the case before us, the deposition was not suppressed, but a single question and answer which were in themselves inadmissible, were excluded. It is the duty of the court to protect the jury against the admissions of illegal evidence, when it is objected to, no matter through what medium it is offered.

It is enacted, by the 8th section of the act of 1832, "to extend the jurisdiction of the State of Alabama, over the territory according to the geographical boundaries within the limits of said State, and for other purposes," "that in all cases where the suit is brought on contracts hereafter made, to recover money or property from any Indian, the consideration shall be proved by two credible witnessess." It is insisted by the counsel for the plaintiff below, and was ruled by the circuit court, that this section applies alone to Indians of full blood. This conclusion is rested upon the assumption that the legislature by using the terms, "Indians, or persons of mixed blood, descended of Indians," in the fourth section, recognized two distinct classes, and as Indians are alone mentioned in the ninth section, those of mixed blood are excluded from its operation. If our legislative acts were drawn with a punctilious regard to exactness of expression, the argument would be more potent; but we all know that the different sections of a statute are not always written by the

same hand, and this will frequently account for a change of phraseology, from general to special terms, and *vice versa*.

The fourth section concedes to "Indians, or persons of mixed blood, descended of Indians," the right to perpetuate testimony, to record "wills, and bills of sale and conveyances, with the testimony of such persons." By the fifth section, white persons living in the Indian country are made subject to the laws applying to white persons living in any other part of the State. The second section authorizes the court of revenue and roads in any county embracing a portion of the Indian territory, to cause such roads, bridges and ferries to be established within the same as the public good requires. By the third section, Indians are exempted from working on the roads, from performing military duty, and serving on juries; and it declares that no tax shall be assessed or collected "from any Indian, or person of mixed blood, descended of Indians," residing in this State. The sixth and seventh sections abolish the laws, usages and customs of the *Creek* and *Cherokee* nations of Indians within this State, contrary to the constitution and laws of the same; and it is made penal for either of these tribes, by "any Indian or Indians," to meet in council, &c., and make such laws for the government of the same. And the fourteenth section declares, that any contract freely and voluntarily made in writing, &c. whereby any white man shall purchase an improvement, &c., "of any Indian, on any of the unceded territory," &c., "shall be obligatory on the parties to such contract."

We cannot think the general term "Indians," was used in a literal or restricted sense, or intended to indicate a class of persons distinct from "persons of mixed blood, descended of Indians;" but these latter terms were used *ex majore cautela*, by the draftsman of the section, or the part of it, in which they are found. They are mere expletives, and do not enlarge the operation of the act. The word "Indians," is sufficiently expansive to embrace them. It will not be contended, that the third section, in exempting Indians from the performance of military duty, working on roads, or serving on juries, applies exclusively to those of the *full blood*; or that a *Creek* or *Cherokee* of *mixed blood* could not be prosecuted and punished under the seventh section for meeting in coun-

cil, &c., and making laws for the tribe, contrary to the laws and constitution of this State. And there is quite as little pretence that the provisions of the fourteenth section are to be limited to purchases made of Indians of unmixed blood.

In common parlance, the word "Indians," includes not only those who have no admixture of blood with the white or negro races, but those descendants of Indians who have become thus mixed, yet retain their distinctive character as members of the tribe from which they trace their descent. The treaty with the Choctaws in 1830, gives to "each Choctaw head of a family being desirous to remain and become a citizen of the State," &c. six hundred and forty acres of land; and this has been held to embrace not only Indians of full, but those of mixed blood also.

The object of a requisition upon a party contracting with an Indian, was, in the language of the court of errors of New York, "to save the Indians from falling victims to their own weakness, and to the superior intelligence, and sometimes to the cupidity of the whites." The statute was intended, "as a guard against the imposition and frauds to which that unfortunate race of men are exposed, from their ignorance and mental debasement." [Goodell v. Jackson, 20 Johns. Rep. 720.] The ignorance of the half breed is in general quite equal to that of the Indian whose blood is unadulterated, and certainly requires the same protection for his rights. So far then as the reason of the enactment we are considering is concerned, they both come within its spirit, and we have seen that the language employed is sufficiently comprehensive to embrace them. It therefore follows that the charge of the circuit court, in limiting the operation of the act of 1832, misapprehended the law. [See Pack v. Pack, 9 Por. Rep. 297.]

The 14th article of the treaty referred to, is as follows: "Each Choctaw head of a family being desirous to remain, and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that

quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon such lands, intending to become citizens of the States, for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article, shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity." [7 U. S. Statutes, by Peters, 335.] It would perhaps have been more correct if the treaty had employed the term *inhabitant* or *resident* instead of "citizen of the States," as Indians cannot, consistently with the constitution and laws, be invested with all the rights, and bound to all the duties of citizens. But no consequence can result from the inaccurate use of a word in this instance; for the reservee who resided upon his reservation for five years after the treaty was ratified, intending to *become a citizen*, &c., was entitled to a grant in fee simple: yet by his claim of land he was "not to lose the privilege of a Choctaw citizen." Having obtained a title to his reservation, he could sell or abandon it at pleasure; his citizenship as a Choctaw never having been lost, it might be resumed without any other prejudice, than the loss of his interest in the Choctaw annuity. The fact then, that the defendant and her supposed husband had received patents for lands under the fourteenth section of the treaty, does not make them citizens; a grant to an Indian, or a foreigner, does not change his political or civil condition; either of them are competent to hold land under a treaty, or a legislative grant. [20 Johns. R. 693.] It may be asked, as in the case here cited—Do our laws allow "Indians to participate equally with us in our civil and political privileges? Do they vote at our elections, or are they represented in our legislature, or have they any concern as jurors or magistrates, in the administration of justice? Are they subject to our laws of marriage and divorce, and would we sustain a criminal prosecution for bigamy, if they should change their wives or husbands at pleasure, and according to their own customs, and contract new matrimonial

alliances? I apprehend that every one of these questions must be answered in the negative ;" at least so long as they continue a distinct and independent community.

In Wall v. Williamson, 8 Ala. Rep. 48, it was held that a marriage between a man and woman of Choctaw extraction and belonging to that tribe of Indians, according to their usages and customs, and before they were superseded by the laws of Alabama, will be recognized as valid. *Further*, that if by the Choctaw law, the husband took no part of the wife's property, the wife must as a necessary consequence retain the capacity to contract, yet she could not be sued in a *court of law*, while the marriage continued. The question is left open, whether the husband could dissolve the marriage by the abandonment of his wife, if they continued to reside in Alabama after their tribe had departed, but it is said to be "very clear that the same effect must be given to a dissolution of the marriage by the Choctaw law, as given to the marriage by the same law. By that law, it appears the husband may at pleasure dissolve the relationship. His abandonment is evidence that he has done so. We conceive the same effect must be given to this act as would be given to a lawful decree in a civilized community dissolving the marriage. If the marriage was by the Choctaw law dissoluble at the pleasure of the husband, and was dissolved by his abandonment, then the wife could be sued as a *feme sole*. *Lastly*, abandonment was inferable from the fact of the husband leaving his wife, and going with his tribe west of the Mississippi. [See also, Morgan v. McGhee, 5 Hump. Rep. 13; Hantz v. Sealy, 6 Binn. Rep. 405; Fenton v. Reed, 4 Johns. Rep. 52; State v. Murphy, 6 Ala. Rep. 765, and cases there cited.]

The decision in eighth Alabama Reports, covers almost the entire branch we are now considering of the case before us, and we think, if the jury affirm the truth of the facts stated by the witnesses at the trial, the defendant may be sued as a *feme sole*. It is said, "the characteristic features of the marriage contract is its permanency; for although it originates in the will of the parties, yet after being contracted, the duration of the union is wholly independent of the will of the parties." [Shelf. on Marriage and Divorce, 3.] But

when a man and woman agree to cohabit for an indefinite period as husband and wife, "that, in a state of nature, would be a marriage, and in the absence of civil and religious institutions, might safely be presumed to be, as it is popularly called, *a marriage in the sight of God*." It has been made a question how long the cohabitation must continue by the law of nature—whether to the end of life. In answer to that inquiry it is said, "that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature in the intention of the parties. The contract thus formed in the state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. [Id. 9.] Marriages among the Indian tribes must be regarded as taking place in a state of nature, and if according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure, the right of dissolution will be considered a term of the contract. Either party may take advantage of this term, unless it be expressly, or impliedly waived by them, or they may perhaps acquire such relations to society as will give permanency to the contract, and take from them the right to annul it.

It will be observed, that the cohabitation of the defendant and D. W. Wall commenced previous to the extension of the jurisdiction of this State over the Indian territory, by the act of 1832; that this enactment abolished only the "laws, usages, and customs of the Creek and Cherokee nations of Indians,"—leaving those of the Choctaws in full force, except so far as they might interfere with the exercise of the jurisdiction conferred upon the tribunals of the State. There is then nothing in the statute which takes from the contract its dissoluble quality by act of the parties—nor can the asking a reservation under the treaty, the acceptance of a patent from the United States for the land embraced by it, and the continued cohabitation in this State for more than five years after the ratification of the treaty, and the departure of the mass of their tribe to the west, have that effect. We have seen that all these cannot take from the defendant and D.

W. Walf their citizenship as Choctaws. The treaty secures to them the right of resuming at pleasure their *status* in the tribe, without reference to time. It cannot in this view of the case be assumed, that the marriage was consummated in contemplation of a residence in Alabama, so as to make this State the *matrimonial domicil*, and its laws govern the relation of the parties. Considering the character of the Indians, their indisposition to renounce native habits and associations, the residence of the parties, &c., such an assumption cannot be indulged.

This exposition of the law applicable to the pleading and facts stated in the record, may suffice to guide the action of the circuit court on a future trial. We will not stop to consider with particularity the questions arising upon the pleadings, or the charges asked or given to the jury, farther than has been already done. In limiting the operation of the 9th section of the act of 1832 to Indians of full blood, we have seen that the law was incorrectly ruled; the judgment is therefore reversed, and the cause remanded.

SMITH v. ROBINSON.

1. It is no valid objection to a decree dismissing a bill having no equity, that the motion was made by a defendant in contempt for want of an answer.
2. When the title to land is conveyed by the principal to his surety, to indemnify him against liability on a recognizance, with power to sell in case of default, and the surety sells and executes a title bond to the purchaser, the contract of sale will not be rescinded, although afterwards the recognizance is released by the Governor.
3. Where lands are sold, and the vendor executes a bond to make titles when the purchase money is fully paid, and he is unable to make a good title, the course of the purchaser is, to tender the purchase money, and de-

Smith v. Robinson.

mand a title, or at least, in a suit to enjoin proceedings for collecting the contract price; to aver the readiness to pay upon a sufficient title being made.

Writ of Error to the Court of Chancery for the fourth District.

THE case made by the bill is this :

Smith, the complainant, in 1838, contracted to purchase from Robinson, the defendant, certain lands described in the bill, at the price of \$1230, for which he gave his notes—one for \$600, payable 1st January, 1839—one for \$300 payable 1st January, 1840—and another for \$330, payable 1st January, 1841—Robinson executed a bond, conditioned to make Smith title in fee simple when these notes should be fully paid. Smith took possession of the lands, and retained possession for several years, in the course of which he paid 450 dollars on the note first coming due, and executed other notes for the residue of the sum of that note. Sometime after the payment of this sum, Smith ascertained, as he alleges, that Robinson had not a good title in fee to the lands sold, and that the real title was in one Harden, who at the time of filing the bill was dead, and who, previous to his death, had removed from this State to parts unknown. The heirs of Harden are alleged to be minors, but they are not parties to the bill. The complainant asserts that Robinson's only title to the lands is derived under a deed of trust executed to him by Harden. This is made an exhibit, and conveys the lands sold by Robinson to Smith, to the former, with other property, on the nominal consideration of one dollar, reciting also that Robinson had become his surety for the sum of \$2,000, in a recognizance to appear and answer a certain criminal charge, and assumed other liabilities for him to the extent of \$1050. The deed proceeds to declare, that the object in executing it is to secure Robinson against these liabilities, and if Harden should appear according to the recognizance, and discharge the other debts for which

Robinson was liable for him, then the property conveyed was to revert to him again, but in the event he should make default in any of the said matters, then Robinson was invested with power to dispose of, bargain, sell and make titles to the whole, or any part of the property conveyed, so as to indemnify himself from any damage which might accrue from the default.

The complainant asserts, that previous to the sale by Robinson of the lands, he had sold a sufficiency of the other property conveyed by the deed to indemnify himself, or nearly so, against all the liabilities, except that arising out of the recognizance, from which he has been discharged by the Governor of the State, and that the remainder of his liability might have been met by a sale of part of the lands.

In view of these facts, complainant insists, the sale to him was without authority, and that having applied to Robinson for a rescission of the contract, he abandoned the lands.

The bill proceeds to show, that judgments have been obtained against the complainant, and some money paid on the outstanding notes. It concludes with a prayer that the contract may be rescinded and the complainant reimbursed what he has paid.

The chancellor, on motion of the defendant, dismissed the bill as containing no equity, although at the time of making this motion, the defendant was in contempt for not answering the bill.

This decree is assigned as error.

POPE, for the plaintiff in error, insisted—

1. The defendant being in contempt, could not be heard on a motion to dismiss. [Massena v. Bartlett, 8 Porter's R. 277.]

2. When a person having no title sells lands belonging to a third person, who dies before the period of payment, or before the title passes, equity will relieve against the contract for purchase and rescind it although there is no fraud. [Bullock v. Bemis, 1 A. K. M. 434; 3 Cranch, 137; 1 Dev. Eq. 18;

Wellborn v. Tiller, 10 Ala. 305 ; Cullum v. Bank, 4 Ala. 21; Young v. Harris, 2 Ib. 112.]

CHILTON, contra, cited Brown v. Parish, 2 Dana, 8 ; Camp v. Camp, 2 Ala. Rep. 632 ; Spence v. Duren, 3 Ib. 251 ; Long v. Brown, 4 Ib. 622.

GOLDTHWAITE, J.—1. It is true, as a general rule, that a defendant to a suit in equity, who stands in contempt of the process of the court, will not be heard in the introduction of any new matter before the court, or to take merely formal objections to the proceedings. [Massena v. Bartlett, 8 Porter, 277.] But we apprehend this rule has never been considered as precluding the dismissal of a bill which has no equity on its face. Indeed, the 31st rule expressly provides that a defendant may *at any time* move to dismiss the bill, or dissolve an injunction for want of equity. [Dig. 616, § 31.]

2. On the merits of the bill, we entirely agree with the chancellor, that it contains no case for relief. When the conveyance from Harden is looked to, it will be seen he invests his creditor with the legal title to the lands which the complainant subsequently contracted to purchase, and expressly authorized the defendant to *dispose of, bargain, sell, and make titles* to the whole, or any part of the property conveyed, so as to indemnify himself from any damage which might arise from a default. Now, under this general power, it is very clear that neither Harden or his heirs can controvert the right of the complainant to have the title under his contract, although the defendant may have been relieved afterwards from his recognizance for Harden's appearance. It does not appear from any allegation of the bill, that at the time of the contract of sale, the defendant had not the right to sell by the terms of the trust deed. This allegation is essential, if the bill is to be considered as alledging a want of authority to sell, and renders it fatally defective.

3. If, in point of fact, the defendant was unable to make a good title in performance of his contract, it is not to be supposed, that by equitable rules he would be permitted to

coerce the purchase money from the complainant, but we apprehend his course under such circumstances would be to tender the money and demand a title, or at least, in a suit to enjoin proceedings for collecting the contract price, to aver his readiness to pay upon a sufficient title being made. [See Cullum v. Bank, 4 Ala. Rep. 21, and cases there cited.] It is unnecessary, however, to consider the case in this aspect, as the bill is not framed to meet it.

Decree affirmed.

STEWART v. DESHA, SHEPPARD & Co.

1. A deputy clerk, in the absence of the principal, may do any act he could do if present. His appointment need not be in writing.
2. H. being indebted to D. & Co., procured S. who was indebted to him, to draw a bill in his favor, on D. & Co., which he indorsed to them, and which they received in payment of the debt of H.—Held, that S. was not entitled to notice of the dishonor of the bill, [no funds being provided for its payment.]

Writ of Error to the Circuit Court of Dallas.

ASSUMPSIT by the defendants in error, as indorsers of a bill of exchange, drawn by the plaintiff in error. The declaration contains counts for the non-acceptance, and non-payment, and alleges notice.

The defendant pleaded non-assumpsit, payment, and set off.

Upon the trial, as we learn from a bill of exceptions, the plaintiff proposed to read a deposition taken on the authority of an affidavit, made before one Outlaw as deputy clerk—the name of the principal clerk no where appearing. It was proved by the clerk, that the deputy had been appointed by him, and qualified as such before a justice of the peace. The

defendant moved the court to reject the deposition for this cause, but the court refused, and the defendant excepted. The plaintiff read the bill of exchange, and protest of the notary—and also the deposition of one Van Kleeck—who testified that one William S. Harrison was indebted to the house of Desha, Sheppard & Co. a balance on account, and for which balance Desha, Sheppard & Co. received the draft in suit, in part payment. The draft was received in this shape, in preference to taking Stewart's note, so as to enable the holders to negotiate the same, if they wished to do so. The draft has not been paid. The house of Desha, Sheppard & Co. never had any transactions with Stewart, prior to, or since the date of this draft, nor has Stewart since the date of the draft, put the plaintiff in funds, by shipment of cotton or otherwise.

The court charged, that the notice proved to have been given, was insufficient, and the question being, whether any notice was necessary under the facts of the case, the defendant requested the court to instruct the jury, that if the defendant was only an accommodation indorser, and if proper notice had not been given him, he was not liable in this action, though he had no effects in the hands of the drawees, who are also the plaintiffs. This charge the court refused, and qualified it thus, that if the bill was drawn by the defendant for the accommodation of Harrison, he was not to be regarded as an accommodation drawer, if there was a consideration between Harrison and the plaintiffs.

2. Further, that if the bill was drawn for the accommodation of Harrison, and on account of his debt to the plaintiffs, and he had not legal notice of the protest, he was not liable.

3. That if they believed from the evidence, that the bill was drawn on account of a debt due from Harrison to the plaintiffs, and was in the form of a bill, rather than that of a promissory note, for the purpose of more easy negotiation, and was so understood, and intended by all the parties, still the defendant was entitled to notice of its dishonor.

4. That if the defendant was induced to draw this bill on account of Harrison's debt to plaintiffs, though they may have been ignorant of this fact, it was notwithstanding ne-

cessary to give him notice of its dishonor, and that the burden of proving notice unnecessary, devolved on the plaintiffs.

5. That if the bill was drawn and passed to the plaintiffs, for the debt of Harrison, and there was no evidence of any other consideration, or of the defendant having received any, he was entitled to notice of protest, and if not given, was not liable.

These charges the court refused to give, and charged the jury, that if the drawer had no funds in the hands of the drawees, at the time of the protest, he was not entitled to notice, unless he was an accommodation drawer. That if the defendant drew the bill for the purpose of paying a debt due from Harrison, the payee, to the plaintiffs, he was not an accommodation drawer. That if a good consideration passed from the plaintiffs to the payee, he was not an accommodation drawer. That if the defendant resists a recovery upon the ground, that he was an accommodation drawer, it was incumbent on him to prove it. That in the absence of all proof, the law presumes, that when a bill is drawn, it is drawn upon consideration, and if the fact is otherwise, he must prove it. That when no notice is given of the non-acceptance, or non-payment of a bill, and it is protested, it devolves upon the plaintiff to show, by proof, that the drawer was not entitled to notice. To the charges given, and to those refused, the defendant excepted, and now assigns for error.

BOLLING, for plaintiff in error.

An accommodation drawer is a security, and entitled to notice, although he had no funds in the hands of the drawee. [Sherrod v. Rhodes, 5 Ala. R. 683.]

See further, to sustain the general assignments of errors, Sherrod v. Rhodes, *supra*; Shirley v. Fellows, Wadsworth & Co. 9 Porter, 300; Ford v. Womack, use, &c. 2 Ala. R. 368; Commercial Bank of Albany v. Hughes, 17 Wend. 94.]

The deposition of the witness, Van Kleek, should have been rejected.

EDWARDS, contra.

1. The deputy clerk could properly administer the oath.

The act authorized it, and in certifying that the oath had been taken, he must necessarily certify that the oath was taken before him, as he, and not the principal clerk administered it. Any different statement would not be conformable to the truth. The usual form of an affidavit shows this is correct. [Clay's Dig. 146, § 19.]

2. The charges asked and given in respect to the law in cases of accommodation drawers, are all upon an abstract assumption, that this was an accommodation bill. Whereas the only evidence in the case, Van Kleek's testimony and the bill itself, showed the contrary. If it had been an accommodation bill, the onus was on them to prove it, but not only did they not attempt to *prove* it, but we proved quite the reverse. The charges asked then, were not applicable to the *proof*, and the charges given were liable to no objection, but from us. They were calculated to mislead the jury to our prejudice only, by inducing them to believe there was some evidence that the bill was an accommodation one.

3. But even if Van Kleek's evidence should be held to have proved that there was no consideration between the drawer and the plaintiffs, still this cannot be considered an accommodation bill, for as between the different plaintiffs and the payee, there was a consideration of indebtedness, and as between the drawer and the payee, the bill imported a consideration of itself, which there was no evidence to contradict.

ORMOND, J.—There is nothing in the objection to the affidavit made to the deputy clerk in order to obtain the order for a deposition. The statute, (Clay's Dig. 146, § 19,) gives the deputy "power and authority to transact all business in the absence of the principal, which the principal could do were he present, and performed the same himself," he is therefore, in the absence of the clerk, substituted for him, and it is certainly proper that when he acts, it should appear it was done before him as deputy. It is not necessary his appointment should be in writing.

This case has previously been before this court, Desha, Sheppard & Co. v. Stewart, 6 Ala. 852, where it was held, that although they were drawees of the bill, they might un-

der certain circumstances, having refused to accept it, sue upon it as indorsers, after its dishonor.

The only questions now presented by the record, grow out of the omission of the plaintiffs to notify the defendant of the dishonor of the bill.

A drawer, who has no funds in the hands of the drawee, is not entitled to notice of the dishonor of a bill, because he cannot be prejudiced by want of notice; but it is insisted that this bill was drawn by Stewart, for the accommodation of Harrison, and he was therefore entitled to notice of its dishonor.

It has been held by a very eminent judge, that although no consideration passes between the payee and drawer of a bill of exchange, it is not to be considered as an accommodation bill, as to the latter, if there was a consideration between the payee and acceptor. [Scott and others v. Lifford, 1 Camp. 247.] The facts of that case were, that one Agar, having an acceptance due to the plaintiffs, begged to have it renewed, which they agreed to, if the defendant would draw a bill upon him for the amount, which he should accept. A bill was accordingly drawn by Lifford, payable to Scott and others, and accepted by Agar. The payee having brought suit on the bill, against Lifford, the drawer, Lord Ellenborough held, the bill was not to be considered as an accommodation bill, there having been a consideration, as between the payees and the acceptor.

The facts of that case, and the principle to be extracted from it, are strikingly analagous to this. Harrison, to pay a debt he owes the plaintiffs, procures Stewart to draw this bill in his favor on the plaintiffs, which it appears he then indorses, and delivered up to them. They occupy in this transaction, the same attitude Scott & Co. did in the case cited. The design of the transaction was, to pay their debt due from Harrison, and if the bill had been drawn on Harrison, payable to the plaintiffs, the case would have been identical with the one at bar.

But in our opinion, the inference from the facts in proof, is, that Stewart was indebted to Harrison, and by drawing

the bill, undertook to pay the money he owed Harrison, to the plaintiffs. No other construction can be put upon the testimony, considered in reference to the purpose the parties had in view, the payment of the debt of Harrison to the plaintiffs, and the willingness of Stewart to execute his note for the payment of the money at the time the bill was drawn. If the fact was not so, and Stewart was merely lending his name to Harrison, he should have proved it. From this view it results, that it was his duty to provide the funds for the payment of the bill, and not having done so, he cannot be prejudiced for want of notice of the dishonor of the bill, that being a fact of which he must have been cognizant.

Let the judgment be affirmed.

PAGE, AND ANOTHER, v. THE STATE.

1. To legalize the retailing of spirituous liquors, it is necessary that a license should first be obtained for that purpose from the county court—a license to keep a tavern does not confer that right.
2. The act incorporating the town of Eutaw does not authorize “*bona fide* licensed tavern keepers” resident in that town to retail spirituous liquors within its limits; unless they first obtain from the county court a license to retail.

Writ of Error to the Circuit Court of Greene.

THE plaintiffs in error were indicted for selling spirituous liquors in less quantities than one quart, without a license, and having pleaded “not guilty,” the cause was submitted to a jury, who returned a verdict of *guilty*, and assessed the fine of each of the defendants at \$20; judgment was thereon rendered.

It was admitted on the trial by the defendants, that they had retailed spirituous liquors in less quantities than one quart; but they offered in evidence a license to keep a tavern in the town of Eutaw, in the county in which the offence was charged to have been committed, which license was in force and had been when the retailing took place. They further proved that they were *bona fide* "licensed tavern keepers" in that town, and read to the jury the act of the legislature of January, 1845, entitled "an act to amend an act incorporating the town of Eutaw, in the county of Greene;" and insisted that the statute, as well as their license as tavern keepers, exempted them from the penalties imposed upon those who retailed spirituous liquors in violation of law. But the court ruled otherwise; thereupon the defendants excepted, and their exceptions being duly sealed, are certified to this court.

J. B. CLARK, for the plaintiffs in error, insisted that tavern keepers, in virtue of their license as such, are authorized to retail spirituous liquors. [Clay's Dig. 554, § 1, 2, 3, 4; 555, § 5, 6, 7, 10; 556, § 12, 13, 18; 560 § 13.] But if this be not so, then it is insisted that the act of January, 1845, confers upon licensed taverns in Eutaw such a right. [Pamphlet acts, 1844-45, p. 133.] Statutes like those under which the indictment is attempted to be supported must be strictly construed. [9 Pick. Rep. 414; 3 Pet. Dig. 575, § 233.]

ATTORNEY GENERAL, for the State. A license to keep a tavern does not of itself confer an authority to retail spirituous liquors. [6 Ala. Rep. 628; Clay's Dig. 556, 557, 560, § 13.] The act of 1845 does not authorize tavern keepers thus to deal in the town of Eutaw, but it restricts the power of the county court, so that it cannot grant a license to retail within its corporate limits to any one who is not a *bona fide* tavern keeper resident there.

COLLIER, C. J.—In *The State v. Cloud*, 6 Ala. Rep. 628, the question before this court was, whether it was an

indictable offence to keep a house of public entertainment for travelers, without first obtaining a license from the county court. After answering this question in the affirmative, it is said that the offence of retailing spirituous liquors without license is distinct from this, although the legislature by the act of 1807 considered a *tavern*, not only a house for the entertainment of travelers, but also for the sale of liquors; but it was supposed that the act of 1843, "to raise a revenue for the support of the State government, and for other purposes," made a distinction, and that a license to keep a tavern was not an authority to retail spirituous liquors. What was said beyond the consideration of the precise point presented, it is insisted is nothing more than a mere *dictum*—not entitled to the weight of authority. Be this as it may, we will address ourselves to the case before us, and treat the question raised upon the bill of exceptions as *res integra*.

It may be conceded that the act of 1807 contemplates a license to keep a tavern as embracing a permission to retail spirituous liquors, and that all the subsequent enactments up to 1837, are passed upon that hypothesis. A statute passed in the latter year provides that every person who may become desirous to obtain a license to retail spirituous liquors in this State shall first produce to the county court, of the county in which he purposes to obtain it, the recommendation of six reputable freeholders or householders thereof, who reside within five miles of the petitioner, and enter into bond and security to be approved by the court, and pay the sum of thirty dollars in open court for the use of the county." [Clay's Dig. 556, § 18.] The seventh section of the act of 1843, to raise a revenue for the support of the State government, and for other purposes, enacts that "for each license to keep tavern in any city in this State, there shall be paid \$50; for each license to keep a tavern in any incorporated town or village, \$10; for each license to retail spirituous or fermented liquors, \$30." [Id. 560, § 13.] By the first section of "an act incorporating the town of Eutaw, in the county of Greene, it is declared that no person except such as are or may be *bona fide* licensed tavern keepers, shall be allowed in any manner or form, to vend any ardent or distilled liquors, in less quantities than one quart, to any person

or persons whatsoever, within one mile of the court house in the town of Eutaw, in the county of Greene, and for every violation of this act, the person or persons so offending shall be subject to indictment, &c. and upon conviction be fined in a sum not less than \$500, and be imprisoned in the county jail, for a term not less than three months."

We think it perfectly clear that the acts of 1837 and 1843, make it necessary, in order to legalize the retailing of spirituous liquors, that a license should be first obtained for that purpose from the county court; and that a license to keep a tavern does not confer such a right. This is apparent from the preliminary steps prescribed by the former; by the distinctions between such licenses as are expressed in the latter, and the tax imposed upon them respectively.

The only question then is, does the act incorporating the town of Eutaw invest "*bona fide* licensed tavern keepers" to retail within its limits. It certainly does not give such a right *in totidem verbis*, and we think the exception in their favor cannot upon any just principles of construction be held to confer an authority—it merely prevents the general prohibition from operating against them. The prohibition is against retailing by all persons, with or without a license; the exception is in favor of tavern keepers, who are permitted to retail pursuant to the provisions of the general law upon the subject, which we have seen makes it necessary to obtain a special license. This exposition is in harmony with reason—carries out the obvious design of the legislature, and is well supported by the rules which have been established for the interpretation of statutes. The circuit court decided the law correctly, and its judgment is affirmed.

ANDRESS, ET AL. V. CRAWFORD, USE, &C.

1. A return to an execution "stayed by the plaintiff till further orders," does not impart verity when the motion is against a sheriff for a false return, but he is required to sustain it by proof.
2. Where the judgment entry recites the default of the party as sheriff of a named county, and a judgment is also given against others as his sureties, it will be presumed they are sureties on his official bond.

Writ of Error to the Circuit Court of Monroe.

SUGGESTION by Crawford, suing for the use of Atkinson against Andress as sheriff, for making a false return to a certain *fi. fa.* at his suit, against one English, et al.

The suggestion sets out that the *fi. fa.* issued the 30th May, 1846, and was the same day received by the sheriff, who falsely returned it "stayed by the plaintiff till further orders." The suggestion appears dated 6th November, 1846, and describes the execution as returnable to the present term.

The judgment entry recites more fully the facts of the case, and describes Andress as the sheriff of Monroe county—its being returnable to the then present term of the circuit court—that the return was false—that the plaintiff prayed an issue—that the defendant had one day's notice of the motion, &c. Whereupon came a jury, &c. with a verdict that the return was false. The court then, upon inspection and proof of the sheriff's bond, gave judgment against him, and against Davidson, S. S. Andress, E. Andress and Haynes, as his sureties, for the amount of the execution, and ten per cent. cost and damages.

At the trial, the court charged the jury, that the sheriff was bound to prove, in this case, that the plaintiff had given the order indicated by the return. Also that the plaintiff was not bound to prove any fraudulent intent on the part of the sheriff in making the return. The defendant asked the

court to charge the jury, that the return must be taken *prima facie* as true, and the burthen of proving its falsity devolved on the plaintiff. Also that there must have been a fraudulent intention on the part of the sheriff in making the return to render him liable. These charges were refused, and the defendant excepted, as well to the charges given as to the refusal to charge as instructed.

These matters are now assigned as error, as is also the judgment against the defendants.

LESLIE, for the plaintiff in error, insisted—

1. In an action against a sheriff for a false return, a fraudulent intention to charge the party must be shown. [Sutherland v. Cunningham, 1 Stew. 438.]

2. A return by the sheriff is *prima facie* evidence in his favor. [1 Greenl. Ev. 46; 2 Ib. 487, § 592; Hartwell v. Root, 19 Johns. 347; Baylor v. Scott, 2 Por. 323.]

3. The entry does not charge the sureties as being of the sheriff of any particular county, and in summary proceedings every fact to charge the parties must appear. [Gary v. Frost, 5 Ala. Rep. 636.]

BLOUNT, contra, contended the decision in Sutherland v. Cunningham, 1 Stew. 438, has no application here, as the matter returned is rather an excuse for making a statutory return, than a return itself. Such an apology is no evidence for the sheriff. [Holderness v. Brassfield, 3 Litt. 271; Buller's N. P. 76; Glissop v. Pole, 3 M. & S. 175; Baylor v. Scott, 2 Por. 315.]

GOLDTHWAITE, J.—1. The return to the execution for which the defendants are sought to be charged, and which the verdict has ascertained to be untrue in point of fact, is not of that technical character which *prima facie* imparts verity. It is rather the assertion of a fact in discharge of the obligation to perform the mandate of the writ. In this view, the decision made in Sutherland v. Cunningham, 1 Stew. 438, has no application, for in most instances of such a return, the creditor has no means in his power to disprove the fact asserted, and if it is to be taken as true until contro-

verted, he would be entirely remediless. It is questionable whether in strict law such an indorsement is entitled to be considered as a return, as it is said to be a sufficient answer to a return of *nulla bona*, when the defendant has property, that the plaintiff directed a delay. [2 Greenl. Ev. § 593; McClure v. Colclough, 5 Ala. Rep. 65; Shannon v. Clark, 3 Dana, 152.] But however this may be, we consider it clear that whenever the truth of such a return as this is controverted, it rests with the officer to sustain it by proof. This conclusion shows there is no error in the charges given by the court, or in its refusal to give those requested.

2. The other point assumed does not seem to be sustained by the record. The judgment entry recites the principal defendant as receiving the execution as sheriff of Monroe county, and it would be a most forced presumption to conclude that those named as his sureties were so in any other capacity than as sheriff of that particular county. No other defect in the judgment is called to our notice, nor have we been able to perceive any which affects the result.

Judgment affirmed.

HENDERSON v. BANK AT MONTGOMERY.

1. A witness who swears that he knows the hand-writing of a person, is *prima facie* competent to testify in relation to it, without stating the source of his knowledge.
2. An agent of the bank being required to produce a sworn copy of his appointment, if of record on the books of the bank, does so by annexing what purports to be a copy from the books, and swearing to it, although he does not expressly state that he compared it with the original.
3. When a levy is made in a county different from that from which the execution issued, and a trial of the right of property is demanded, the copy of the execution returned by the sheriff to the county of the trial, has the same effect as if it was an original execution, without any certificate that it is a copy.

4. The claimant is estopped by his bond, from denying that a levy was made.

Writ of Error to the Circuit Court of Monroe.

TRIAL of the right of property. The bank having levied an execution on certain slaves, as the property of Charles T. McConico, and Julius A. Wood, a claim was interposed to try the right, and bond executed by the plaintiff in error.

Upon the trial, as appears from a bill of exceptions, the plaintiff introduced the deposition of one Wm. A. Campbell. The plaintiff objected to the fifth interrogatory, and the answer to it, as follows:

Do you, or not, know the said *fi. fa.*'s are copied? If so, state whose hand-writing. Do you know whether Paul Williamson, whose name is written on said *fi. fa.*, is living, or dead? If so, state the fact as it may be.

Answer—I do. In the hand-writing of Paul Williamson. The No. 12512. The body of the *fi. fa.* 12701, I am not satisfied is in the hand-writing of Paul Williamson.

The claimant objected to this interrogatory and the answer, but the objection was overruled.

The plaintiff also examined said witness, to prove whether he was agent of the bank, and directed him, if the books of the bank contained the evidence of his appointment, to annex to his deposition a sworn copy. The witness answered that he was appointed agent, and says, see exhibit A, which is as follows: "Branch Bank at Montgomery, Ala. At a meeting of the board of Directors, this day, there was present the President, Messrs. Baldwin, Benson and Chisholm. The board proceeded to the election of an agent, Messrs. W. Gunnison, W. A. Campbell, Sidney Mayhurst, William J. Bibb, James M. Newman, and E. C. Sanders were in nomination. After several unsuccessful ballotings, Messrs. Bibb and Saunders were withdrawn, and on the fourth ballot the vote stood, for William A. Campbell, three; James M. Newman, one; whereupon William A. Campbell was declared duly elected. This paper was signed by Camp-

bell, and sworn to before the commissioner by him. To the reading of this exhibit the claimant objected, but his objection was overruled.

The plaintiff also offered in evidence, a paper purporting to be a copy of the execution in favor of the bank, which is the one previously referred to as No. 12512, because there is no evidence showing it to be a copy, and no certificate thereon of its being a copy.

The proof was, the plaintiff required Campbell to look upon two copies of *fi. fa*'s, which are particularly described, and are those numbered 12512 and 12707, "and state, whether the originals of said *fi. fa*'s ever came to your hands, from whom, and when did you receive them, and what action you took on them. If you did not act on them yourself, to whom did you deliver them. State to whom and for what purpose. Answer—The originals of Nos. 12512 and 12707, were placed in my hands as said agent, on the 30th May, 1843, by the bank. I delivered them to Paul Williamson, my deputy, to make the money on the same. And it also appearing from the testimony of Campbell, that Williamson was his duly appointed deputy, and had given bond as such, but had never been sworn a deputy, thereupon the defendant objected to the reading of the copy of the execution, and the return thereon, there being no other evidence of a levy, but the court overruled the objection. And also, moved the court to charge, that the return of Williamson was no evidence of a levy, which the court refused. To all these matters the claimant excepted, and now assigns as error.

LESLIE, for plaintiff in error.

BLOUNT, contra.

ORMOND, J.—When the witness, Campbell, answered, that he knew the writing shown to him to be the hand-writing of Paul Williamson, the answer included within it an affirmation, that he knew the hand-writing of Williamson. If it was thought proper by the adverse party, he should have inquired into the source of his knowledge. It is not necessary to qualify one to swear that a paper is in

the hand-writing of a particular person, that he should state how he obtained a knowledge of the character of his hand-writing.

The objection to the reading of the exhibit to the deposition of Campbell, was not tenable. A sworn copy from the books of the bank, it is admitted was sufficient, as it clearly was, the books themselves not being subject to be produced by a *subpœna duces tecum*. The witness under the interrogatory produces this transcript from the books, and swears to it. This establishes it as a sworn copy. He does not, it is true, say he compared it with the original, but he was required by the interrogatory, if the books of the bank contained a record of his appointment, to annex to his deposition a sworn copy. This he does in obedience thereto, and in the language of the commissioner, deposes to it; which, though not very formal, can admit of no other construction, than that it is a true copy of what it purports to be.

The execution issued from the circuit court of Montgomery, and was levied on property in the county of Monroe, where the claim was interposed. The act of 1828, (Clay's Dig. 213, § 63,) requires the sheriff in such a case, to return the original execution to the county whence it came, and make out a copy of the execution and return thereon, and return it to the county in which the levy was made, "and the copy of such execution shall be sufficient for the court to proceed on, and try the right of the property levied on." The execution found in the record, contains an indorsement of the levy, and the return of the officer, but is not certified as a copy, though from the evidence in the cause, it appears to have been a copy, and not the original.

In *Garrett v. Rhea*, 9 Ala. 136, we held as to a certificate of a sheriff, in such a case as the present, that the copy so transmitted was a correct copy of the original, and the return thereon was sufficient. It was not necessary then to consider whether any such certificate was necessary. We are of the opinion that it is not. The statute does not require it, nor from the nature of the case could one be necessary. The paper shows upon its face, that it is not an original execution, and being returned with the bond, and affidavit of the claimant, by the sheriff making the levy, to the court of

the county in which the trial is to be had, is entitled to the same consideration there, that it would have if the execution had issued from the same court.

The officer who made the levy being dead, the plaintiff has taken the deposition of a witness to prove that his signature to the return is in his hand-writing. But this was wholly unnecessary, the claimant is estopped by his own deed from denying the levy, and in addition, it has been repeatedly held, that a claimant of property cannot object to any irregularity in the judgment, or execution. [See *Fryer v. Dennis*, 2 Ala. 144, and previous and subsequent cases.] This last remark applies with full force to the objection, that the deputy had never been sworn in as such.

Let the judgment be affirmed.

NATIONS v. HAWKINS' ADM'RS.

1. The statute which declares that the action of trover shall survive for and against an executor or administrator, was intended to subject them to that form of action in their representative capacity, where a conversion had taken place in the lifetime of the testator or intestate.
2. To support the action of trover, the plaintiff must at the time of the conversion have had a *property* in the chattel, either *general* or *special*, and the *actual possession* or the *right* to the *immediate possession*; consequently, if one who has a life estate in a personal chattel exchanges it with a third person as his absolute property, he who has the interest in remainder cannot maintain trover for the conversion; but a court of equity may perhaps protect his right to the future enjoyment of the thing.
3. Where a declaration contained two counts in trover, to which a third was added alledging a conversion of the chattel by selling or otherwise disposing of it, whereby the plaintiff is greatly aggrieved, injured and prejudiced in his reversionary estate and interest, to wit, to his damage, fifteen hundred dollars; and concludes that the defendants, though often requested, have hitherto failed, neglected and refused, and doth still fail, neglect and refuse to pay the said sum of money, or any part thereof, to

the plaintiffs damage, &c: *Held*, that the plaintiff could not recover on this count, as setting forth a cause of action *ex contractu*; but like those which preceded it, it must be considered as in form *ex delicto*.

Writ of Error to the Circuit Court of Marion.

THIS was an action of *trover* at the suit of the plaintiff in error. The declaration contains several counts. The first alleges the finding and conversion by the intestate of two slaves, the property of the plaintiff; the second alleges that the plaintiff hired to the intestate for the term of his life two slaves, which the latter sold absolutely out of his possession, thus converting them to his own use; the third alleges that the plaintiff was the proprietor of two slaves, which the intestate obtained possession of, under a contract in writing with the plaintiff, to hold them during his intestate's life; but intending to injure the plaintiff, he sold them absolutely out of his possession, thus converting them to his own use, so that plaintiff's reversionary interest has been prejudiced, &c. To this declaration the defendants pleaded—1. Not guilty; 2. The statute of limitations; and 3. No assets; and issues were joined upon all these pleas. On the trial, the plaintiff excepted to the ruling of the court. To support his declaration, the plaintiff read to the jury a deed, dated the 13th February, 1837, which affirmed that the intestate, in consideration of the natural love and affection which he had for the plaintiff and Richard Nations, and the further consideration of five dollars to him in hand paid, thereby gave, granted, bargained and sold to them "jointly, vesting equal rights in both, and to their heirs forever, four negro slaves, to wit, Viny, a female slave, about the age of eighteen; Thomas, a male slave about the same age; Ned, a male slave about the age of eight years; and Esquire, a male slave about the age of six years; reserving the right of the use of these slaves unto the said David Hawkins during his natural life," &c. This deed was acknowledged by the grantor on the day of its date, and deposited with the clerk of the county court of Blount, the county in which all the parties then resided, and on the next day was recorded.

In December, 1840, the grantor having previously removed

to Marion county, exchanged the slave Thomas, for another, and the slave received by him in exchange passed into the hands of the defendants as a part of their intestate's estate. After the intestate's removal to Marion in the fall of 1839, he exchanged the woman Viny for another slave, who after his death passed into the defendant's hands as a part of his estate. The intestate died in the fall of 1844.

Plaintiff also adduced a deed from Richard Nations to himself, by which, for a valuable consideration, he acquired all the right and title of Nations to the slaves described in the deed executed by the intestate in 1837—proved its execution, and then read the same to the jury. The value of the slaves was also proved.

The court was of opinion that the plaintiff could not recover in *trover* upon either count of the declaration; that as the exchange of the slaves by the intestate was not such a conversion as subjected him to an action at the plaintiff's suit, the defendants, as his personal representatives, were not liable upon that ground. A verdict was returned for the defendants, and judgment was thereupon rendered:

W. R. SMITH, for the plaintiff in error. *Trover* survives against executors and administrators, [Clay's Dig. 313; 3 Stew. Rep. 172; 8 Por. Rep. 183;] and where the deceased converted a chattel in his lifetime, his personal representatives are suable. The exchange by the intestate of the slaves as his absolute property was a conversion. [4 T. Rep. 260.] It was a breach of trust, and as such amounts to a conversion. [10 Johns. Rep. 175; 1 Cow. Rep. 334; 7 Por. Rep. 480.] If the right of action was not complete in the intestate's lifetime, because the plaintiff had not a right of possession, upon his death this right attached.

If the testimony discloses a cause of action which died with the person, the first two counts may be abandoned, and the third count, though beginning in *case*, may be considered a count upon an implied contract, as it assigns a breach against the defendants for failing, neglecting and refusing to pay a sum of money. It would have been good on demurrer as a count for money had and received. No objection was taken upon the ground of a misjoinder or other irregularity.

ties, and these were all cured by the pleading. [See 8 Por. Rep. 181.]

COGGIN, for the defendants, insisted that an action of *trover* cannot be maintained against an administrator unless his intestate had been guilty of a conversion. To maintain this action, the plaintiff must at the time of the conversion have had the actual possession, or the right to the immediate possession. [Chitty's Plead. 170.] In this case, the exchange of slaves before the intestate's death and during the continuance of his life, was not as it respects the plaintiff, a conversion. The defendants never had possession of the slaves, and consequently could not have converted them; there is therefore no ground upon which they could be charged. [Chitty's Plead. 176.] An action on the case would not lie upon the facts; but if they are chargeable in any form of proceeding, it is case.

COLLIER, C. J.—The deed of the intestate under which the plaintiff claims, reserves to the former during his life, the use of the slaves described therein. This reservation of course entitled the intestate to the possession, and continued in him such a right of property as was necessary for the protection of the usufruct. This being the case, it is clear, that although a court of equity would in a proper case have so exercised its powers as to secure to the donees under the deed, the enjoyment of their remainder, yet they could not during the donor's life have maintained an action which requires that the plaintiff should have not only a right of property, but a present right to the possession.

It is laid down in all the elementary works upon pleadings and actions, that *trover* would not lie at the common law against an executor or administrator upon the conversion of his testator or intestate; and our statute merely declares that it shall survive for and against them. [Clay's Dig. 313, § 2.] This enactment obviously presupposes that to subject a personal representative to the action of *trover*, his testator or intestate must have been thus suable. This is indicated by the employment of the word "survive," which in the connection it is found, means to outlive the decedent, or in

other words, that the action shall not as at common law die with the person; but as a remedy, shall retain its vitality either for or against the representatives of his estate, according as the right may be.

In order to support the action of trover, it is said the plaintiff must at the time of the conversion have had a *property* in the chattel, either *general* or *special*; he must also have had the *actual possession*, or the *right* to the *immediate possession*. [1 Chit. Plead. 150, and cases there cited.] It has therefore been held that where the furniture leased with a house was wrongfully taken in execution by a sheriff, the landlord could not maintain trover against the sheriff pending the lease, but should have declared specially in an action on the case. [7 T. Rep. 9; Willes' Rep. 56.] And as trover is founded on the right of property, either general or special, it is allowable for the defendant to show a right of property in a third person when the conversion took place. [2 Hayw. Rep. 139, 179; Taylor's Rep. (N. C.) 152.] In *Andrews v. Shaw*, 4 Dev. Rep. 70, it was decided that the plaintiff in trover must have both the right of property and of present possession, and when a person who had hired a slave for a year sold him, it was held the owner could not maintain trover during the term, although the defendant claimed the absolute title to the slave. [See also 2 Murp. R. 240, 302; No. Ca. T. R. 187.]

Starkie, in his treatise on Evidence, (3 vol. p. 1483,) says in general, possession of a chattel is *prima facie* evidence of property in the possessor; but if the plaintiff has never had possession of the chattel, or if the contest be not with a mere stranger, but with one who will succeed in his proof of title, unless the plaintiff can prove a better, it is necessary for the latter to resort to strict evidence of title. But the right of possession must exist at the time of the conversion. [Ibid, 1491; 2 Saund. on Plead. and Ev. 873; 2 Esp. Rep. 465; 3 Camp. Rep. 417; 4 B. & C. Rep. 941; 7 D. & R. Rep. 896; R. & M. Rep. 99; 5 B. & A. Rep. 826; 1 Burr. Rep. 31; 1 Bla. R. 67; 1 M. & P. R. 556.]

It is clear, from what has been said, the plaintiff was not entitled to the possession of the slaves in question until after the death of the intestate; consequently, the latter was not

suable in an action of trover, and his administrators we have seen are not answerable to the plaintiff in that form of action.

The third count in the declaration, after alledging a conversion of the slaves by selling or otherwise disposing of them to the intestate's use, avers that the plaintiff is thereby greatly aggrieved, injured and prejudiced in his reversionary estate and interest, to wit, to his damage fifteen hundred dollars; and concludes thus: "the said defendants, administrator, &c." as aforesaid, though often requested, have hitherto wholly failed, neglected and refused, and doth still fail, neglect and refuse to pay the said sum of money, or any part thereof, to the said plaintiff, to his damage," &c. The conclusion of this count cannot exert such an influence upon the supposed cause of action disclosed in it, and the manner in which it is stated, as wholly to change its character from *ex delicto* to *ex contractu*. Each count indicates by its frame that it belongs to the former category. It can hardly be possible that the plaintiff is remediless, yet we have sufficiently performed our duty by considering the points presented for our decision, and have only to add, that the judgment of the circuit court is affirmed.

HEIRS OF McVOY v. HALLETT AND WALKER.

1. Under the Spanish law in force in a portion of this State previous to its acquisition from France, the husband could make a valid sale of the paraphernal estate of the wife with her consent, and her joining in the deed is evidence of such consent, although that is not executed with the formalities required to a public act. The deed is binding on the parties and their heirs as a private act.
2. One effect of extending the laws of the Mississippi territory over the country so acquired was, to introduce the common law mode of proving deeds, by proving the signatures of subscribing witnesses where the gran-

tor is dead—as well as allow the probate and registration of deeds previously executed under the statute laws then in force.

Writ of Error to the Court of Chancery for the first district.

THIS bill was filed by Mrs. McVoy, in March, 1843, and after her death was revived by her heirs, against the executors and devisees of Joshua Kennedy. The case made by the bill is this, to wit :

At the the time of her intermarriage with D. McVoy, in the year 1807, Mrs. McVoy was the widow of one McCarton, who in his lifetime was seized in fee of the lands in controversy, these having been conceded to him by the Governor and Intendant of Louisiana, in August, 1787, and afterwards confirmed, in 1810, to Mrs. McVoy as his devisee, under his last will, in due form of law. In June, 1810, McVoy conveyed the lands to Kennedy by deed, which also purports to be signed by Mrs. McVoy, as a markswoman, but which she insists was never signed by her, nor did she ever execute any deed in legal form, and binding on her according to the laws in force. This deed, which is exhibited, is in the usual form of a conveyance, but contains this stipulation, to wit : “And we further agree, that this deed not being signed and executed before the commandant of Mobile, according to the laws of Spain, shall not invalidate the same, and that it shall be good and valid in law.

Under color of this conveyance, Kennedy, soon after its execution, took possession of the lands, and held them until his death, which occurred in December, 1838, and his executors have had possession since that time to the filing of the bill.

Kennedy, in his lifetime obtained a patent for the lands from the United States, as the assignee of Mrs. McVoy.

The prayer of the bill is, that the defendants may be decreed to convey to the complainant such parts of the lands as remain unsold by Kennedy, for an account of such as have been sold, as well as the profits, &c.

The answer of the defendants admits the seisin of McCarton—his marriage with the complainant—his devise to her of the lands in controversy—his death, and her subsequent intermarriage with McVoy.

They insist, that in June, 1810, Kennedy received two conveyances from McVoy, and the complainant, his wife, both executed by them, and duly delivered to Kennedy, by which all their right to the lands was transferred to him. They also insist, that Kennedy, under the act of 1812, presented his claim to the commissioners of the United States, produced his title papers and made his proofs. And the United States, by act of May 8th, 1822, confirmed his claim to him personally, and not in trust for the complainant or any other person. Neither the said complainant nor McVoy, her husband, making any claim to the said lands before the commissioners, and the said Kennedy having remained more than thirty years in possession of the lands.

They also plead the general statute of limitations, and the special act of 13th December, 1816, in bar of the complainant's claim.

The proof shows, that both the subscribing witnesses, as the grantors in the deed are dead, and the hand-writing of Mrs. McVoy, who executed it by a mark. In addition to this, there is the probate of the deed, by one of the subscribing witnesses, made on the first September, 1814, before one of the justices of the quorum of Mobile county. The proof is also full as to the possession of Kennedy, under the deed, since 1810, as well of his exhibition of his claim for the lands, to the commissioners, under the act of Congress of 1812, confirmation of this claim, as derived through a permission of the Spanish authorities for McCarton to settle the lands, and a quit claim patent from the United States, in pursuance of this confirmation.

The chancellor considering the case as clear for the defendants on every point raised by their answer, dismissed the bill.

This decree is now assigned as error.

A. F. HOPKINS, and J. F. ADAMS, for the plaintiffs in error, contended—

1. That the land belonging to the wife, McVoy, the husband, had no authority by sale to divest her title, and she was incapable of conveying it in any other mode than prescribed by 58 Law Partidas, 3 Tit. 18; 1 Vol. Part. 218; 11 Teatis de la Legislation, &c. 275.

2. But the deed is not even valid as to McVoy, as the sale was not executed by a notary, and signed by two other notaries, or three respectable persons as witnesses. [1 Partidas, 225, 233 to 235.] The validity of a deed executed before witnesses, endures, even if valid, only during the lifetime of the witnesses. [1 Partidas, 232.]

3. But according to the regulations of the colony of Louisiana, no sale was valid without the written consent of the commandant, [1 White New Rec. 719, 720.; 2 Ib. 236.; 2 White Comp. 695; 1 Ib. 719,] and it cannot be disputed that the *lex fori* is to govern. [Towns v. Bardwell, 1 S. & P. 36; Crawford v. Childers, 1 Ala. R. 483; Brown v. Brown, 5 Ib. 508; Goodman v. Munks, 8 Porter, 84; Doyle v. Botter, 7 Ala. Rep. 246.]

3. It has been held, that the statute prohibiting suits against administrators for six months after the grant of administration suspends for that time the statute of limitations. [Hutchinson v. Tolls, 2 Por. 44; Houpt v. Shields, 3 Ib. 248.] In like manner the change of dominion over Mobile, and the surrender of the country subsequent to the commencement of the prescription suspends it as to a *feme covert* against whom the statute of limitations of the new sovereignty did not run. [Sledge v. Clopton, 6 Ala. Rep. 589; 5 Ib. 660.]

4. It is the equitable title of Mrs. McVoy derived from McCarton, which Kennedy procured to be confirmed, and therefore the confirmation inures to her, the more especially as she was under disability when the title was confirmed. [Kennedy v. Kennedy, 2 Ala. Rep. 571; Mason v. Watts, 6 Cranch, 148; Bodley v. Taylor, 5 Ib. 191; Robinson v. Campbell, 3 Wheat. 212.]

G. N. STEWART, and J. A. CAMPBELL, for the defendants in error, argued—

1. From the case made by the bill, it appears the com-

plainants have a legal title, and there is no impediment to a recovery at law. The bill therefore has no equity.

2. The land in controversy was paraphernal estate of Mrs. McVoy, and by the civil law in force at Mobile, when the sale was made, it was competent for the husband and wife to convey it. [4 Martin, N. S. 404; 8 Ib. 288; Hawes v. Bryan, 10 Louis, 136; Fowler v. Boyd, 12, Ib. 70.] There is a distinction between *dotal* and *paraphernal* estates.—[Louis' Code, art. 2314, 2315; 6 Martin, 14.] The husband and wife may alienate the one, but perhaps cannot disturb the other. [8 Touilliere, tit. 8, § 3, 51, 52, 53, 60, 103, 164, 165, 166, 171, 179.]

3. There is no specific allegation of *coverture* in the bill, and no avoidance of the statute of limitations by any statement to bring the complainant within the exceptions of the statute. Supposing, however, that the fact of an existing *coverture*, from 1810 to 1841, can be collected from the bill, still there is no proof that such was the case, and such proof is essential. [Maury v. Mason, 8 Porter, 211-15; Dig. 327, § 83; 328, § 87.]

4. But under the Spanish law, prescription was against a married woman, during her *coverture*, in cases like this.—[2 Louis. 360.]

5. The claim of Mrs. McVoy, was never presented for confirmation, and is barred by the provisions of the act of Congress of 1812. [See 1 Land Laws, 606, § 4; Strother v. Lucas, 12 Peters, 410.]

6. This suit is also barred by our statute of 1816, (Dig. 328, § 87,) as the claim of Mrs. McVoy was never presented to the United States commissioners, as required to be done by that act.

HOPKINS, in reply argued—

1. That the complainant alledges in her bill the facts which show her to be within the exceptions of the statute, and therefore it was necessary for the defendants to deny these in their answer. [Story's Eq. Pl. § 680; 3 M. & C. 475; Mitford, 289, 241, 298; 6 Vesey, 594; 11 Pick. 331.] Every plea is understood to admit, for the purpose of trying

the validity of the plea, all the facts of the bill, which are not traversed. [Mitford, 242 ; Cooper, 231 ; 3 Atk. 241.]

2. Proscription, or the statute of limitations, is governed by the *lex fori*, and if personal property is moved from one *forum* where the statute had commenced to run into another, where there was no statute, or one different, the parties would be controlled by the law of the place where the suit was instituted ; it follows therefore, that when Mobile passed to the dominion of the United States, the land ceased to be governed by the proscription laws of Spain or France, and was controlled by the local law—no title by prescription having been acquired by the foreign law. [7 Martin, N. S. 108.]

GOLDTHWAITE, J.—1. The conclusion to which the court has arrived in this cause, will render it unimportant to consider any but one of the positions assumed by the complainants. We think the deed executed by Mrs. McVoy, in 1810, is sufficient to transfer her estate in the land to Kennedy. It is conceded by the counsel on each side, that this was *paraphernal* property, as distinguished from *dotal*. It is said by Domat, that property is paraphernal which the wife gives not to the dotal estate—whether she expresses what she reserves, or specifies that to which she directs this title to be given. All that remains is paraphernal. [Domat des dots Tit. 9, § 4.] And it is the same when there is no constitution of any dower estate. [Hannie v. Browdon, 6 Martin, 14.] It is also said by Domat, that the difference between dotal and paraphernal estates consists in this—that whilst the revenues of that which is dotal go to the husband, those of the paraphernal remain with the wife, and she can dispose of them as well as of the principal estate itself, without authority from her husband. This we apprehend, continued to be the law of Louisiana until changed by the adoption of their civil code, which it seems prohibits an alienation by the wife of her paraphernal estate, without the husband's consent. [12 Martin, 242.] We need not however advert to this matter, as here the consent of the husband is certainly given—if the deed is to be considered as the act of the wife ; and it seems equally certain, the consent of the wife is to be

inferred from her joining in the conveyance, if the deed should be taken as the act of the husband. The questions to be considered are, whether the husband alone, or jointly with his wife, has legally conveyed her title by the deed exhibited, and if so, whether the deed itself is properly established by the proof.

In questions of this nature, although the decisions of our sister State of Louisiana, may not be conclusive authority of what the laws of Spain were at the date of the deed, yet they certainly are entitled to the utmost respect, and would incline a scale otherwise doubtful. We may concede that the citations from the Partidas and other works, leave it doubtful if effect would be given to the mere act of the wife, in executing a deed, or act of sale, deficient in the legal formalities, but the case at bar is not of that nature. It is the private act of the husband and wife together, and in this view seems precisely the same as one sustained under very similar circumstances in *O'Conner v. Bane*, 3 Martin, 446. There the title to the land in controversy, by the death of its former owner, vested in his widow, and four children, in 1782. The widow having intermarried again, joined her husband in the execution of an informal act of sale. The children brought suit for the land in 1814, and the presumption arising from its being for the whole of the land, is, their mother was then dead, though this fact does not appear in the statement of the case. The court held, that one half of the land was paraphernal estate of the wife, and that its alienation by the husband, with the consent of the wife, was a lawful act, and the instrument of sale, though defective in form as a public act, was good as a private one, and binding on the parties and their heirs. This case is conclusive as to the effect of the deed, and it only requires to be ascertained if that is sufficiently proved.

2. We are not informed what the Spanish law is with reference to the proof of a private act, verified by a mark only, instead of the written name of the grantor, nor is it in this case material that we should be. It is obvious the effect, or validity of a deed is quite different from the proof by which its execution may be made manifest. It must be valid or in-

valid when it passes from the hand of its grantor, but that it did so pass, may be established by such evidence as the law making power shall from time to time direct, whenever the mode of attestation, or proof, does not of itself enter into the validity of the act. Thus it may be possible, though we should greatly incline to doubt it, the signature of a marks-woman, or man, may not by the Spanish law be proveable, after her or his death, except by living witnesses, but if this be so, it does not derogate from the authority of our legislature, in assuming the jurisdiction over whatever was Spanish domain, to provide a remedy for so apparent an evil. This was done, in effect, by our common, as well as our statute law. The first permits the proof of the signatures of subscribing witnesses, when they are dead, as the only mode at the command of those on whom it devolves. The last provides that deeds may be admitted to registration when proved in a particular form by the witnesses or any one of them, and that the probate thus authorized, shall establish the deed at any future period. It appears the defendants were prepared with both these modes of proof, and we are entirely satisfied either was sufficient as one of the consequences of extending the laws of the territory of Mississippi, over the then recently acquired territory, was to introduce the common law mode of proving deeds, as well as to warrant their probate and registration, independent of any actual litigation:

The result of our judgment is, the affirmance of that of the chancellor.

Decree affirmed.

NOLLY V. WILKINS, ADM'R DE BONIS NON.

1. An administrator *de bonis non* of a solvent estate, can only recover from his predecessor, whether he has been removed, or has resigned, the assets which remain in his hands, in specie, unconverted. A settlement of his administration can only be made between him and the distributees, or legatees of the estate.

Error to the Orphans' Court of Baldwin.

On the 17th October, 1842, the plaintiff in error was appointed administrator of the estate of Henry Snelgrove with the will annexed, and being subsequently cited to give additional security, he appeared on the 4th March, 1844, and presented his account with the estate, and on the 16th April, 1844, resigned his trust, and the defendant in error was appointed administrator *de bonis non* of the estate, and at the same time the plaintiff in error filed his accounts and vouchers for final settlement, which was directed to be made on the 15th June, 1844, and publication ordered.

The record then recites, that on the 16th June, 1844, at a regular term of the court, the plaintiff in error appeared, and presented his accounts and vouchers, and it appearing to the satisfaction of the court, that they have been duly audited, and passed upon by the court, and that the administrator has received \$1317 25, and disbursed the sum of \$880 17, including the sum of \$300, heretofore paid to Levi Snelgrove, one of the legatees, and also the sum of \$50 for maintenance of William Snelgrove, another of said legatees. It is therefore decreed by the court, that the said administrator retain the sum of \$38 65 for his care and labor, in and about said administration, and further that after paying G. F. Lindsey for attorney's fees the sum of \$20, to the clerk of this court for his fees and final publication \$22 87, to the judge of this court for his fees \$10, making in all the sum of \$52 87, he pay over the residue, say \$417 55, to William Wilkins ad-

administrator *de bonis non*, and if not paid in twenty days, that execution issue therefor. It is further ordered, that said administrator forthwith deliver to said Wilkins a certain negro woman, and her child belonging to said estate.

From this decree this writ is prosecuted, and the following errors assigned:

1. The court erred in not auditing and examining the account at the time appointed by the order of publication.

2. The court erred in not stating the account before any decree was rendered.

3. The court erred in rendering the judgment in favor of Wilkins for \$417 55.

4. In rendering judgment in favor of Lindsey.

5. In rendering judgment in favor of the clerk and judge of the court.

6. In rendering any judgment in favor of the administrator *de bonis non* against plaintiff in error.

7. In taking jurisdiction against Nolly, after he had resigned.

8. The court had no authority to receive and adjust the accounts of the plaintiff in error.

9. In making a final decree at the same time at which the account was stated.

10. In making a final decree, and directing an execution to issue.

HOPKINS, for plaintiff in error, cited 2 Porter, 33; Id. 550; 5 Rand. 51; 9 Ala. 725; 8 Id. 278; Clay's Dig. 312, § 39.

ORMOND, J.—In *Willis v. Willis'* adm'r, 9 Ala. 721, it was held, that a decree against a removed administrator, in favor of an administrator *de bonis non*, and execution ordered to issue in favor of the latter, was such an error as would reverse the decree, and as that is the predicament of this case, the judgment of the orphans' court must be reversed for this cause, and as it must be remanded, we proceed to consider some other questions presented on the record, and which must necessarily arise when the case is sent back.

In the case previously cited, it is left in doubt, whether the

orphans' court has power to settle the accounts of a removed administrator, either on his voluntary application, or on the application of those interested. There can be no difference as to this question, between a removed administrator, or one voluntarily resigning his trust, and in either case, we consider it clear the orphans' court has this power. The authority conferred on it is general, to settle the accounts of executors and administrators, and the necessity for such settlement is the same, whether he has resigned, been removed, or continues to execute the trust. Indeed, where an executor or administrator removes beyond the State, express authority is conferred on the court to settle his accounts *ex parte*. [Clay's Dig. 230, § 47.]

In whose favor is the decree in such a case as the present to be rendered? It has been repeatedly held by this court, that the administrator *de bonis non* is only entitled to such of the assets of the estate, as remain in the hands of his predecessor in specie, unaltered and unconverted. See these cases collected, and commented on, in *Willis v. Willis'* administrator, *supra*. It follows that the distributees, or legatees, are the persons who should cite the late administrator to a settlement, and in whose favor a judgment should be rendered, whether the settlement is voluntary or compulsory. The authority conferred on the administrator *de bonis non* by the act of 1843, (Clay's Dig. § 9,) to sue the former administrator, either in the orphans' or any other court of law or equity, to recover the assets, applies only to insolvent estates, and has no application in such a case as this.

The permission granted by the court to the administrator, to retain out of the balance adjudged to be in his hands, an attorney's fee, and the fees of the clerk and judge of the court, is an error of form merely. It would have been more regular to have charged these items in his account, against the estate, but as the result is precisely the same, the judgment would not be reversed for this cause.

It is proper however to state, that in the settlement of the account, there is an error of a much graver character. The administrator received a credit of \$300, paid to one legatee, and \$50 for the maintenance of another. These items were

not proper credits in the settlement of his administration account. After an account had been stated, and balance struck, upon proof of payment to a legatee, he would have been allowed it as a credit against the share of such legatee, or as a satisfaction, if it was a payment in full. [Carroll v. Moore, adm'r, 6 Ala. 618.] It does not appear, whether the other legatee, to whom an advance was made, was a minor or not. That advances to minors for their maintenance, cannot be brought into the settlement of the administration account, see Willis v. Willis, 9 Ala. 334.

It is needless to consider the other questions made by the assignment of errors, as they will not probably arise again.

Let the decree of the orphans' court be reversed, and the cause be remanded for further proceedings.

PRICE v. THOMASON.

1. Where a judgment is rendered discharging a garnishee, without setting out his answer *in extenso*, but affirms that he has filed one which is the basis of the judgment, this is sufficient to authorize an appellate court to look to an answer found in the transcript, as a part of the record.
2. The garnishee answered at the return of the garnishment, that he purchased of the defendant certain property, under a deed of trust to a third person to secure a sum of money of a greater amount than the value of the property, for which he executed his bonds for \$500, payable at future times, which are particularly stated; these bonds it was agreed might be discharged in cash, or by paying the vendor's debts. Previous to the service of the garnishment, the garnishee extinguished some demands against the vendor, but to what amount he is unable to state. The deed of trust is still an incumbrance on the property, and the debt, or a part of it, mentioned therein, is still unsettled. Garnishee may have received some things from the defendant that are not embraced by the deed of trust, but the value of these would not more than compensate him for services rendered to the defendant, and the board of his family before the service of the garnishment: *Further*, that he does not consider that he owes the de-

fendant any thing ; that he has not, nor did he have any of his effects in his hands when the garnishment was served ; nor does he know of any person who is indebted to him, or has any of his effects: *Held*, that it cannot be intended that the answer was designedly evasive, or intended to avoid a legal responsibility; that although it should have been more precise and explicit, if possible to make it so, yet the defects in this respect, may be attributable to some other cause than an intention to deceive the plaintiff or impose on the court; that if the plaintiff was dissatisfied with it, he should have examined the garnishee or controverted its truth. Therefore, a judgment discharging the garnishee on such an answer, will not be reversed on error.

3. The amendment of a judgment discharging the garnishee *nunc pro tunc*, by setting out his answer at length, which was previously a part of the record, is no ground for the reversal of the judgment.

Writ of Error to the Circuit Court of Perry.

THE defendant in error was summoned as a garnishee in February, 1844, to answer upon oath what he was indebted to Samuel G. Stewart, &c. against whose estate an attachment had been issued at the suit of the plaintiff. At the term of the circuit court to which the garnishment was returned, the garnishee answered, that about the 4th December, 1843, he purchased of the defendant in attachment five negroes and other property, all of which was made a deed of trust to Peter J. Knight, to secure certain sums of money, amounting to more than the property was worth, for which he executed to his vendor two bonds—the first due the 4th day of December, 1844, and the other at longer time. By these bonds the garnishee promised to pay the obligee \$5000, which might be discharged, either in cash or by paying his debts. Before the garnishment was served, the garnishee had extinguished some demands against Stewart—to what amount he is unable to say. The deed of trust is yet an incumbrance on the property, and the claims, or a part of them, mentioned therein, are yet unsettled. Garnishee may have received some few things from Stewart that were not embraced by the deed to Knight; but not more than would compensate him for services rendered to Stewart, and for the board of his (Stewart's) family before he was served with the

garnishment; and that he does not consider that he owes the defendant in attachment until the incumbrance is removed: *Further*, that he has not, nor did he have any of the effects of Stewart in his hands when the garnishment was served; nor does he know of any person who is indebted to him, or has any of his effects.

At the term when the answer was made, a judgment was rendered reciting that the plaintiff came by his attorney, and the garnishee having filed his answer, was thereupon discharged. "It is therefore considered by the court, that said garnishee go hence without day and recover of the said plaintiff the costs of suit in this behalf expended," &c. Afterwards, at the fall term, 1846, of the circuit court, an entry was made, reciting that the plaintiff by attorney moved the court to amend the judgment of discharge of the garnishee, rendered at the spring term, 1844, *nunc pro tunc*. Which motion was accordingly granted.

B. F. PORTER, for the plaintiff in error, insisted that the garnishee was discharged on an answer palpably evasive, and framed studiously to admit an indebtedness, and avoid a judgment. It was not permissible two and a half years after his discharge for the garnishee to avoid the consequences of his evasion by amending his answer. [3 Stew. Rep. 139.] A judgment *nunc pro tunc* must be founded on matter of record. [2 Stew. Rep. 470.]

E. W. PECK, for the defendant in error. A garnishee may be allowed to amend his answer, but whether leave should be granted or not, cannot be revised on error. [6 Ala. Rep. 818.] The answer does not admit an indebtedness, and it could not be known whether the garnishee would owe the defendant in attachment any thing, until the lien of the deed of trust was discharged. [4 Ala. Rep. 385; 6 Id. 818.] If the plaintiff had any remedy, it was in equity, where the rights of the parties could be adjusted.

COLLIER, C. J.—In *Presnall v. Mabry*, 3 Port. R. 105, this court say, "It is a clear principle of law, that a judgment cannot be rendered on the answer of a garnishee, a-

gainst him, unless there is a distinct admission of a legal debt, either due or to become due by him to the defendant in the original suit." And where the garnishee answered, that he was indebted to the defendant in attachment by note, but had sets off, and could not know until a settlement was had, how the balance was, it was held that the plaintiff could not have judgment. [1 Stew. R. 9.] So where the garnishee admitted that he was indebted to the defendant in attachment in a certain sum to be discharged in *store accounts*, then due, a judgment against him was refused—this court remarking, that the plaintiff's remedy was in equity to have the accounts assigned and collected for the satisfaction of his judgment. [Smith v. Chapman & Brothers, 6 Port. R. 365 ; see also, 1 Ala. R. 421.] In Scales v. Swan, 9 Port. R. 163, it was said the court was not bound to receive a written answer—the statute giving to the plaintiff, if he desires it, the right to examine the garnishee in open court ; although, for the sake of convenience and despatch of business, such an examination may be waived. The court however is not bound to receive any evasive written answer, but may consider it a nullity, and enter an interlocutory judgment. Where the defendant moves for judgment upon the written answer filed by the garnishee, it will be inferred that he accepted it, and waived an examination in open court. [Leigh v. Smith, 5 Ala. Rep. 583.] And if, instead of being active, he permits the court without objection, to render a judgment discharging the garnishee, he must be held not to have intended to controvert its truth, and dispensed with any further examination.

Here the first judgment which was rendered, discharged the garnishee, although it does not set out his answer *in extenso*, affirms that he has filed his answer, which was the basis of the judgment in his favor. This is quite sufficient to authorize us to look to the answer found in the transcript as a part of the record. [3 Ala. R. 114 ; 4 Id. 385 ; 5 Id. 583 ; 6 Id. 73.] The material question then is, would the court have been warranted upon the answer in rendering a judgment against the garnishee. Where a garnishee admitted that he was indebted to the defendant in the sum of \$800, from one to two hundred dollars of which was discharged in

saddlery, it was held that the plaintiff was not entitled to an unconditional judgment against the garnishee for eight hundred dollars; but the question is asked, if the court could have delayed proceeding to afford the garnishee opportunity to deliver the saddlery according to his contract; or could the entire debt have been condemned with a reservation to the garnishee of the right to deliver the saddlery to the sheriff, and *pro tanto* discharge the judgment. [5 Ala. R. 648; see also 6 Ala. R. 818.]

The answer in the present case cannot be considered so evasive and indirect as to have required the court to reject it, if there was no objection to its reception by the plaintiff. The garnishee states his purchase from the defendant in attachment, the price agreed, and how and when it was to be paid, affirms, without expressing the amount of the incumbrance, that the debts intended to be secured exceeded the value of the slaves and other property. He affirms that the bonds given for the purchase money were payable in cash, or in liabilities against the defendant, of which the garnishee might become the proprietor. He had paid some debts of the defendant, but the amount he could not state. It is further answered, that the incumbrance of the deed of trust still continues, and that the debts, or a part or them, provided for by it are yet unsettled; and until this incumbrance is removed, he does not consider that he owes any thing to the defendant.

We think that it cannot be assumed, in respect to this answer, that it was intentionally evasive, and was framed with the view of avoiding a legal responsibility. True, the answer should have stated with precision the amount for which the property was incumbered, the balance due thereon, if the garnishee was aware of it, and the amount of liabilities against the defendant, which he had extinguished. Yet the omissions in this respect may be attributed to some other cause than an intention to deceive or impose on the plaintiff, or the court.

The plaintiff, as the record affirms, must be presumed to have been in court when the answer was made, and if dissatisfied with it, should have examined the garnishee, or controverted its truth. It was certainly the duty of the court,

if our previous decisions are to be followed, to have rendered the judgment in favor of the garnishee. In the predicament of the record, the acceptance of the answer without objection, must be intended.

There is nothing in the record to indicate that the garnishee ever amended his answer, either by adding to, or substituting another in its stead. The only change in the record, after the garnishee was discharged, was to set out his answer at length *nunc pro tunc*, in the judgment; and this appears to have been done on the plaintiff's motion. But if this amendment had been made at the garnishee's instance, whether properly or not, it was altogether harmless, and would furnish no ground for the reversal—the reference to the answer in the judgment as originally rendered, we have seen, made it a part of the record, and copying it into the judgment entry could do no more. The judgment of the circuit court is consequently affirmed.

FROW & FERGUSON v. DOWNMAN.

1. The grantor in a deed of trust containing no reservation or condition for the benefit of the grantor, is not a mortgagor within the terms of the act excluding mortgagors, or defendants in execution from being witnesses in claim suits—the individual not being the defendant in execution, and the property being levied on as that of a third person.
2. A bankrupt vendor who has received his certificate, and who offers to release all his interest to his grantee and assignees, and to whom a release is offered by his grantee, is a competent witness.
3. The general assignee of a debtor—no consideration passing at the time of the assignment, or rights given up—is not a *bona fide* purchaser without notice, but the property conveyed is held by them in the same condition as by the debtor.
4. In a claim suit, the claimant cannot show an outstanding title in a stranger for the purpose of defeating the execution.

Writ of Error to the Circuit Court of Dallas.

CLAIM of property interposed by Frow and Ferguson to certain slaves levied on at the suit of Downman, as an execution creditor of one Treadwell.

At the trial, it appeared the claimants made title to the slaves in controversy, under a deed of assignment by one Parkman, for the benefit of certain creditors therein named. It was in proof, the slaves had once belonged to Treadwell, but were sold by the sheriff, under an execution against him, and that Parkman became the purchaser, and received a bill of sale as such ; but there was also evidence tending to show the purchase was made with funds furnished by Treadwell, or that Parkman had subsequently been refunded the money paid. It was also in proof, that this sale took place in 1838, and that the slaves returned to Treadwell, immediately after, and remained with him until his death, in 1842.

During the trial, the claimant offered Parkman as a witness—showing he was a certificated bankrupt, since the execution of the deed to the claimants, and he proposing to execute a release to his assignee in bankruptcy of all excess which might remain after paying his debts. The claimants also proposed to execute a release to Parkman, of all causes of action growing out of his assignment to them. The plaintiff objected to the competency of this witness, and the court excluded him as within the terms of the statute prohibiting defendants in execution and mortgagors from being witnesses.

The claimants contended, that Treadwell was indebted to Parkman at the time the latter purchased the slaves, and was then in an insolvent and destitute condition, that the effects which it was in evidence had been furnished by him to Parkman, were received on account, and in partial discharge of this indebtedness, and also, that if the slaves were purchased with the means, and for the benefit of Treadwell, that he before that time had assigned the property to trustees in trust for his creditors, but that the lien of the execution under

which the slaves were sold, was anterior to this assignment, and therefore in no event were the slaves subject to the present levy, inasmuch as any title acquired by Treadwell through Parkman, inured to the trustees in Treadwell's deed—as evidence tending to establish these facts, or some of them, the claimant proposed to read Treadwell's deed of trust—it appearing therein that Parkman was a creditor of Treadwell for a considerable sum. The court excluded this deed.

The claimants asked the court to charge the jury, that if Parkman's purchase at the sheriff's sale was fraudulent, or if he bid in the property for Treadwell's benefit, and with his means, yet if Parkman afterwards made a valid and *bona fide* assignment, to secure valid and subsisting debts, to his creditors, to the claimants, without their having notice of the fraud or character of said sale, and without any knowledge or notice on the part of claimants, or of such creditors, of the fraud, that then they were not affected by it, but would be considered as innocent purchasers for a valuable consideration, and as such protected. This was refused, and the jury instructed to the reverse.

The claimants excepted to the several rulings of the court, and now assign the same as error.

EDWARDS, for the plaintiff in error, insisted—

1. The statute is not applicable to one in the condition of this witness; he is not the defendant in execution, or a mortgagor in the sense of the act. [Acts of 1845, p. 136.] The releases offered removed all interest. [Brown v. Brown, 5 Ala. Rep. 508.]

2. The rejection of Treadwell's deed of assignment was irregular; it would have shown he was not the owner of the slaves.

3. The claimants were purchasers from Parkman, and must be regarded as purchasers for a valuable consideration, and therefore not affected by the fraud between Parkman and Treadwell. [2 Root, 359; Harper, 481; 1 Dev. & B.

29; 10 John. 185; 1 Peters, 46; 1 Dev. & B. 76; 2 John. Ch. 371; Fenno v. Cook, 3 Ala. 473.]

BOLLING, contra, contended—

1. That Parkman, if not within the precise terms of the statute of '45, was within the evil intended to be eradicated. [Yarborough v. Moss, 9 Ala. Rep. 382; Brumby v. Langdon, 10 Ala. 747; Carville v. Stout, *Ib.* 796.]

2. The property being Treadwell's, could not be placed beyond the reach of his creditors by any conveyance from Parkman.

3. In a claim cause, the title of a third person cannot be interposed to defeat the creditor. [Hart v. McGrew, 1 Port. 175; Parnell v. Hogan, 5 S. & P. 192; McGregor v. Hall, 3 *Ib.* 397.]

GOLDTHWAITE, J.—1. We think the circuit court was mistaken in considering the witness it excluded as within the terms or intention of the act of 1845, rendering the mortgagor, or defendant in execution incompetent in claim suits. The object of this statute was, to change the law as it then stood in two particulars—first, to permit the mortgagee to interpose a claim when the mortgaged estate was levied on at the suit of a creditor of the mortgagor, irrespective of the law day of the deed—and second, to prevent the mortgagor defendant in execution from giving testimony in all trials of the right of property, whether under that or the existing laws. [Brumby v. Langdon, 10 Ala. R. 747; Acts of 1845, p. 136.] It is evident that the witness is not the defendant in execution, because there is another person who fills that condition, and the only question is, whether he stands as a mortgagor within the meaning of the act. It is very possible a conveyance in trust for the benefit of creditors, where a condition is reserved that the deed shall be void upon the payment of the debts, would be considered as a mortgage within this act, but where the trust, as it is by the deed in this instance, is created absolutely, and without any condi-

tion whatever, the grantor is in no sense of the term a *mortgagor*. The estate of the trustees is dependent on no condition, and vests absolutely on the execution of the deed. Under it, they at any moment could require the possession, and act as owners to any extent compatible with the trusts. Although we thus come to the conclusion the witness is not within the terms or intention of the act referred to, the point of rejection cannot be finally disposed of without the further consideration, whether, independent of this, the witness was competent.

2. His true relation to the trustees in the deed, who are the claimants here, is that of a vendor, with a trust resulting to himself in the event the property conveyed should leave a surplus, after satisfying the trusts declared—in other words, after the payment of all creditors. Like all other vendors of personal estate, it is possible he might be liable on the implied warranty of title. Independent of these interests, which are capable of being released by the witness, and the trustees, there is one which, under ordinary circumstances, would not be releasable by any but the creditors themselves; and this is the interest which arises to the witness from the disposition of the slaves to the payments of the *cestui que trusts* of the deed. Whenever, or however those debts are paid, it is an advantage to the witness. But standing as a discharged bankrupt, these as well as all other debts are extinguished, and the only interest remaining with him, is the possible one arising out of the implied warranty, (assuming that a warranty is not discharged by the bankruptcy,) and the interest he has in the residue of his estate, which possibly may remain after paying his debts under the decree. As we understand the record, these were all offered to be released. The decision of *Brown v. Brown*, 5 Ala. R. 508, is direct, to show that a vendor who is released by his vendee, is a competent witness, as well as that the release need not be delivered to the party in person. We are clear, that upon the execution of the necessary releases to and from the witness, that his competency was restored, whatever the exceptions to his credibility might be, from his peculiar relation to the title.

3. It is very evident the trustees and *cestuis que trust* in the deed, do not occupy the position of *bona fide* purchasers without notice. In point of fact, they are mere volunteers parting with no consideration at the execution of the deed, and giving up no rights of which they were then possessed. An assignee, under such circumstances, is in no better condition than if the property had been subject to a secret trust, and as to such, it is the well settled rule, they are not considered as *bona fide* purchasers. The general assignee of a debtor in failing circumstances, stands in precisely the same condition as the debtor himself. [Story's Eq. § 1228; see also, Bank of Mobile v. Hall, 6 Ala. Rep. 639; Carver, Woolsey, et als. v. Miller & Co. at this term.] We think the refusal to give the charge requested was proper.

4. The only other matter to be noticed is, the rejection of the deed by which Treadwell assigned the slaves to persons who are strangers to the suit. It is the settled rule of this court, in relation to claim suits, that the claimant is not permitted to show an outstanding title in a stranger, for the purpose of defeating the plaintiff's execution. [McGrew v. Hart, 1 Port. 175.]

For the error in excluding the witness, the judgment must be reversed and remanded.

BUTLER v. LEE.

1. A parol executory contract for the sale of land, cannot be enforced at law; but where the contract is executed by a conveyance of the land, assumpsit will lie for the purchase money.
2. The action cannot be maintained, if the conveyance is not made until after the action is commenced.
3. A contract executed on Sunday, is not validated by a subsequent recognition; but where the terms of a contract only are agreed on, on Sunday, and subsequently executed, it may be enforced.

Error to the Circuit Court of Macon.

ASSUMPSIT by the plaintiff, against the defendant in error.

The following facts were agreed to by the parties: In 1842, the plaintiff and defendant made a joint purchase of a section of land, and took from their vendor a bond conditioned to make title, when the purchase money should be paid, and entered into possession. An agreement was then entered into orally, to divide the lands into two equal parts, but the lines were not run at that time. The defendant then agreed with the plaintiff to pay him \$150, in two equal payments, on the first January, 1843, and 1844, if the plaintiff would let him select as his portion one of the parcels which was designated, and permit him to have the use and possession of certain other lands, parcel of the section, during the year 1842, whether on running the line, the land last mentioned should fall within the portion selected by defendant, or not. That soon afterwards, plaintiff ploughed up a few acres of cotton, which defendant had planted on a portion of the land, the possession of which had been secured to him by the contract for the year 1842.

This contract was made on Sunday, but was mentioned and ratified by plaintiff and defendant next day. That defendant has continued in possession of the land selected by him, from the date of the contract, and in the latter part of the year 1842, procured the county surveyor to run the line in accordance with the division previously agreed on, and that subsequent to the institution of this suit, the vendor of the land, by the mutual directions of the plaintiff and defendant, made titles to each respectively, for the land to which each was entitled under the division aforesaid. No other writing was ever executed in relation to the division.

Upon these facts the court rendered judgment for the defendant, from which the plaintiff prosecutes this writ, and which he now assigns for error.

GUNN, for plaintiff in error.

1. If two make a joint purchase of lands, receive an equitable title, subsequently make partition, take possession,

make improvements on their parcels thus partitioned, and agree that one is to pay the other a certain sum for choice of parcels, and receive titles from their vendor in accordance with the same, that an action of assumpsit will lie to recover the price thus agreed upon, more particularly where the person promising to pay has gone on to have the parcels surveyed, and subsequently receives title from the original vendor for the parcel partitioned to him. [See *Haven v. Foster*, 9 Pick. 112; *Sheppard v. Little*, 14 Johns. 210; *Bruen v. Bell*, 20 Johns. R. 338; *Cope v. Williams*, 4 Ala. 364; *Meredith v. Nash*, 3 Stew. 207; *Goodwin, et al. v. Gilbert, et al.* 9 Mass. 510; *Davenport v. Mason*, 15 Ib. 85; *Ewing v. Tees*, 1 Binn. 450; 4 H. & M. 376; *Eppes' ex'rs v. Cole and wife*, 4 H. & M. 161; *Hoskins v. Wright, adm'r*, 1 H. & M. 378.]

2. In contracts for the sale of lands, vendor may recover in assumpsit the price agreed to be paid. Where nothing more remains to be done by him, the parties occupy the same position as when vendor has made deed, [7 Ala. R. 161; 1 Ala. R. 299,] and may maintain action for the purchase money, when a specific performance would be enforced in chancery. [3 Stew. 207.]

The principles here contended for do not, it is conceived, fall within the influence of the case of *Johnson v. Harrison*, 6 Ala. R. 351, the contract being executed on the part of one of the parties, as in the case of *Rhodes, adm'r, v. Glen*, 7 Ala. R. 346.

The facts of the case as set forth in the bill of exceptions—the taking possession, cultivation, improvements, survey, and reception of title—relieve this case from the operation of the rule laid down in the case of *O'Donnell v. Sweeney*, 5 Ala. 467, and is equivalent to the subsequent promise referred to in 9 Ala. 198.

The proofs are only required to be substantially such as charged to authorize a recovery. [*Hitchcock v. Lukens*, 8 P. 333.]

Cocke, contra.

1. The facts agreed upon show a consideration variant from that averred in the several counts of the declaration.

"If any part of an entire consideration, or of a consideration consisting of several things, be omitted, the plaintiff will fail on the ground of variance." [1 Chit. Pl. 293.]

2. The contract was made on Sunday, and therefore void. [Clay's Dig. 592, § 1; O'Donnel v. Sweeney, 5 Ala. 467.] Its ratification on the following day cannot validate it. [Shippey, et al. Eastwood, 9 Ala. 198.] Even if a subsequent ratification could, under a proper state of facts, validate it, that state of facts is not shown to exist. The plaintiff's case could only be made out by resorting to the void contract for aid, and that he cannot be permitted to do. [Chit. on Con. 214, and cases cited in note.]

3. If the contract however, with its subsequent ratification, is sufficient to support the action, the plaintiff forfeited his right to enforce it, by a breach of it on his part.

4. The contract is also void under the statute of frauds. The plaintiff was not entitled to recover, it not having been evidenced by any writing prior to the institution of his suit. [Johnson v. Harrison, 6 Ala. 351; McDowell v. Delap, 2 A. K. Marsh. 33; Jackson v. Pierce, 2 Johns. 221.]

ORMOND, J.—The contract is in substance, an agreement by which the defendant was to pay the plaintiff \$150 for the choice of two half sections of land, which belonged to them jointly, and the right to cultivate for one year a portion of cleared land, it being as it appears, uncertain at the time, whether all the cleared land was on the half section selected by the defendant.

It is very clear, that so long as this contract remained executory, not being in writing it could not be enforced at law by either party, at least so far as it relates to the choice of the half sections. But it is equally certain, that after it was executed by a conveyance of the land to the defendant, pursuant to the contract, an action will lie, for the consideration agreed to be paid. It is indeed the common case of assumpsit for the purchase money, after a sale and conveyance of an estate in land. [See the precedents. 2 Chit. Pl. 38.]

As this conveyance had not been made when this action was brought, it was prematurely commenced, and the court

correctly rendered judgment for the defendant on the facts agreed. The plaintiff cannot maintain this action, by proof of facts subsequent to its commencement, by which alone he has the right to sue at law.

The refusal of the plaintiff to permit the defendant to enjoy a portion of the cleared land, which by the contract he was to have the use of for one year, will not defeat his right to an action on the contract, but would go in mitigation of the damages.

A contract made on Sunday cannot be enforced, nor will a subsequent ratification validate it, as it was originally void. [Sheppey v. Eastwood, 9 Ala. 198.] But when, as in this case, nothing is done towards the performance or execution of the contract until a subsequent period, the fact that a similar contract had been previously made on Sunday, will not bring the subsequent contract within the statute. This is not the ratification of a contract previously made, but is a new and substantive contract. In the case cited, if the promissory note there sought to be enforced, had not been made on Sunday, but subsequently, the fact that the parties had made a similar contract previously on Sunday, which was not valid, could not render nugatory the subsequent binding contract.

Let the judgment be affirmed.

GOOKIN v. RICHARDSON.

1. In order to pass the *legal* interest in a promissory note to a third person, and to invest him with a right of action in his own name, the transfer must be made by indorsement; and the indorsement of a receipt given by an attorney at law for a note placed in his hands for collection, will not pass to the assignee the legal title to the note, although the attorney, by an in-

- dorsement on the receipt, promised to pay to him the proceeds when collected; and such an assignment does not impose upon the obligee the necessity of pursuing the same steps as are necessary to charge an indorser.
2. Where assignable or negotiable paper is transferred otherwise than by indorsement, that a debt due from the assignor to the assignee, might be extinguished by an application of the proceeds, the inference that if the notes were unproductive, the assignor would be chargeable upon the original consideration, may be repelled by countervailing proof, either oral or written.

Writ of Error to the Circuit Court of Lauderdale.

THIS was an action of assumpsit, which was tried on the *general issue*, a verdict returned for the plaintiff, and judgment rendered accordingly. On the trial, the defendant excepted to the ruling of the court. The plaintiff gave in evidence a paper purporting to be a receipt of one Brocchus, an attorney at law, to the defendant, for the collection of two notes therein mentioned; which receipt is in the following terms: "Rec'd, Florence, Ala. 18th March, 1844, for collection, of Mr. Charles Gookin, the following notes of hand, viz: one signed by Henry A. Bragg, dated 12th July, 1843, due one day after date, for the sum of \$479 50; also, one other note, signed by H. G. Mitchell, dated 2d October, 1843, due one day after date, for one hundred dollars, with interest from 1st January, 1843." The defendant, by his indorsement on the receipt, assigned the notes therein described to the plaintiff, thus: "I assign the within notes to Mr. William A. Richardson, value rec'd, this 28th May, 1844." The plaintiff then proved by Brocchus, another indorsement on the receipt, of the following tenor, "In accordance with the above assignment, I will pay over the proceeds of the within mentioned notes, when collected, on account of Wm. A. Richardson to John Simpson & Co., Charles Gookin, the assignor, to pay the costs of collection. May 29, 1844.

P. E. BROCCHUS."

Plaintiff then, to show due diligence in endeavoring to collect the notes, produced the records of two suits, from which it appeared that the defendant had recovered a judg-

ment on each, at the fall term of the circuit court of Lauderdale, holden in 1844; that executions were duly issued thereon, and returned "no property found." It was also proved, on the part of the plaintiff, that the defendant was indebted to him in a much larger sum than the amount of the two notes, and that they were transferred in substitution of that indebtedness in the manner above stated.

The defendant then produced the account of the plaintiff against him, which was receipted, thus: "Rec'd payment, this 28th May, 1844, in full of all demands up to this date." Signed, "W. A. Richardson, per James Todd;" and also proved, that the notes in the hands of Brocchus were received by the plaintiff, without recourse to him if he should fail to collect them of their respective makers. This testimony was however excluded, on the ground that it went to vary or contradict the indorsement of the receipt.

The court charged the jury, that if they believed the evidence in the cause, and were satisfied that the assignment was made, as proved, for a pre-existing debt, and the plaintiff had used due diligence in prosecuting the suits on the notes to judgment, and had failed to collect the amount due thereon, then they must find for the plaintiff.

E. W. PECK, for the plaintiff in error, insisted, that the indorsement of the receipt of Mr. Brocchus, did not transfer the legal interest in the notes, but only conferred upon the assignee the authority to control the proceedings upon them, and to receive the money when collected. [Chitty on Bills, 131, note, 171, note; Story on Bills, 222; 1 H. Bla. Rep. 605.] The evidence that the assignment was made without recourse, does not contradict any written contract. [3 Ala. Rep. 610; 6 Id. 146, 249.] The charge of the court is erroneous; for conceding the truth of the evidence, and it does not sustain the declaration.

L. P. WALKER, for the defendant in error, contended, that the testimony excluded by the court went to vary the written contract by which the plaintiff became the proprietor of the notes; and was therefore rightly rejected. [8 Johns. Rep. 190; 19 Id. 313; 3 Stew. Rep. 271; 2 Porter's Rep.

308; 5 Id. 498; 2 Ala. R. 280; 3 Id. 610, 648; 8 Id. 250.] The bill of exceptions does not raise the question whether the notes were transferred by the indorsement of the receipt; if it does, it is insisted that the indorsement passed the title to the notes. [Story on Prom. Notes, 127; Story on Bills, 225; Chitty on Bills, 235; 3 Dana's Rep. 21; 2 Ala. Rep. 275; 9 Id. 30.] If a note is received in payment of a pre-existing debt, the party receiving it, if it is not paid, may maintain an action on the original consideration. [Chitty on Bills, 244; 7 T. Rep. 65; 2 Porter's Rep. 409; 1 Cow. R. 413; 1 Cranch's Rep. 181.] The note of a third person thus received is *prima facie*, a conditional payment—merely accepting such note, or giving a receipt in full for the debt, is not sufficient to prevent the recourse of the creditor, in the event of non-payment. [2 Caines Rep. 116; 5 Johns. Rep. 68; 9 Id. 309; 10 Pet. Rep. 534; 1 Smith's Lead. Cases and notes, 256.] Although the plaintiff does not declare as an indorsee, yet the indorsement was admissible under the common counts, and cannot be varied by parol proof in such case, any more than if it had been specially declared on. [1 Hawk's Rep. 195.] The notes being in suit when the transaction took place, they could not be assigned otherwise than by an indorsement of the receipt.

COLLIER, C. J.—According to the principles of mercantile law, a bill or promissory note payable to a certain person or his order, could only be transferred by indorsement, so as to enable the holder to maintain an action thereon in *his own name* against the previous parties. A mere assignment of such paper without an indorsement, will invest the holder with the same rights only, as he would acquire upon an assignment of a bill not negotiable; and if the *beneficial* interest be transferred, but there has been no indorsement, the action must be brought in the name of the payee. [Story on Bills, 222; Chitty on Bills, 9th Am. ed. 252; Gibson v. Minet, 1 H. Bla. Rep. 605; Pearse v. Hirst, 10 B. & C. Rep. 122; Peacock v. Rhodes, Doug. R. 633; Andrews & Bros. v. McCoy, 8 Ala. Rep. 920, 927.]

It is declared by a statute of this State, that all writings for the payment of money, or any other thing, may be as-

signed by indorsement, whether they are payable to the order or assigns of the obligee or payee, or not; and the assignee may sue thereon in his own name. [Clay's Dig. 381, § 6; see also, Id. 383, § 12.]

From this view of the law, it is entirely clear, that the legal title to the notes in the hands of Mr. Brocchus, did not pass to the plaintiff by the indorsements on the receipt. The assignment of the notes, as evidenced by the defendant's indorsement on the receipt, did not authorize the assignee to hold the makers liable to him *ex directo*, though in equity it conferred all the title which the assignor had. He might have controlled their collection, received the money, settled with, or released the makers, subject to any lien of the attorney. The indorsement of Mr. Brocchus recognizes the act of the defendant, promises to pay the proceeds of the notes, when collected, on account of the assignee to Messrs. Simpson & Co., and look to the assignor to pay the costs of collection.

The contract then between the plaintiff and defendant is not analagous to an indorsement that is, it does not *prima facie* impose upon the assignee the necessity of adopting the same measures as are necessary to charge an indorser. It may be conceded that whenever it was shown by extrinsic proof that the defendant was indebted to the plaintiff, and that the receipt was indorsed with the view of furnishing from the proceeds of the notes, the means of extinguishing this indebtedness, the presumption would arise, that if the notes were unproductive, then the assignor would be chargeable upon the original consideration. But this presumption would be a mere inference of fact, and might be repelled or entirely removed by countervailing proof. No rule of evidence would be violated by its admission—there is no writing indicating the contract between the parties, which would be contradicted, added to, or varied. The evidence then, that the notes were assigned without recourse, or that the defendant should stand discharged from his indebtedness, although the plaintiff failed to realize the amount of them, serve but to show what was the contract between the parties. In the absence of a writing showing this, by agreement of the parties, or by legal intentment and conclusion operating upon a

writing, the evidence was free from objection. The ruling of the circuit court is consequently erroneous—its judgment is therefore reversed, and the cause remanded.

ATWOOD v. SMITH.

1. A court of chancery will direct an issue to be tried at law only in those cases where doubt is produced in the mind of the chancellor, either by the nature of the proof itself, or by reason of conflicting evidence.
2. Although an issue has been directed to ascertain the sanity or insanity of an individual at the time of making a contract, and the verdict of insanity is returned by the jury, and the judge trying the cause certifies that he cannot say it was improper, yet an appellate court must disregard these proceedings, if the evidence at the hearing of the bill was such that the chancellor should have decreed on it in the first instance.
3. Where one partner is bound to attend personally to the business of the firm, and afterwards becomes infirm in mind by reason of intemperance, a court of equity will not be authorized to set aside an agreement then made for the dissolution of the concern, on the ground of fraud and imposition, when that is to be inferred only from the fact that profits have been realized when loss was anticipated.

Writ of Error to the Court of Chancery for the Thirteenth Chancery District.

THE bill in this case is filed by Smith against Atwood, and its object is to set aside an agreement entered into between them on the 22d July, 1841, dissolving a co-partnership previously existing, and also to set aside a deed for a lot of land, of the same date, on the ground of the insanity of the complainant at the time of executing them, as well as for an account and settlement of the partnership.

The answer denies the fact of insanity, and proof being taken, the cause was heard on bill, answer and testimony. The chancellor directed an issue to be tried in the circuit court. This was accordingly tried, and a verdict returned

that Smith, on the 22d of July, 1841, at the time the agreement and deed were made, was deranged in mind, and not of sufficient mental capacity to give his free and voluntary consent to the said agreement and deed. The circuit judge certified to the chancellor that he could not say he was dissatisfied with the verdict of the jury. From the nature of the testimony, and the general complexion of things on the trial, he would not however have certified against the verdict of the jury, let it have turned either way.

A motion was made to the chancellor for a new trial, which he refused, and adopted the verdict as the basis of his decree.

As the decision of the case involves the consideration how far the award of the issue was proper, it is necessary to set out the evidence touching the insanity of the complainant.

Mr. Malone knows the parties—the complainant since 1835. They commenced business as partners at Prairie Bluff in '37 or '38. They dissolved in July, 1841. From May '40 to May '41 the firm sold \$31,000 of merchandise—the business was conducted entirely by the complainant, with the aid of clerks. The witness' belief was that the complainant was not in his right mind; for a month or two previous to the 22d July, '41, and after that date, the conduct and deportment of the complainant was not that of a man of sound mind and memory; he came repeatedly to the store of Burke & Radcliff, in June and July, walked behind the counter, and examined many of the books of that firm, without invitation, and without saying a word, afterwards closing them and walking out entirely silent. This he had never done previously. On another occasion, in July '41, the witness saw him walking the streets at 12 or 1 o'clock at night; he also came up into the second story of a house where the witness was sitting up with a sick man; he then had nothing on but his shirt; he acted in this manner some two or three times in that month—going up to about the head or last step of the stairs, and returning without saying a word. Witness knew the complainant's habits, and never saw him drink spirits, and never saw him drunk; there was no change for six weeks, embracing the whole of July; at some times during this period he appeared more bright and talkative, and at

others the contrary. The complainant left Prairie Bluff in August, 1841, and returned in April, '42—the condition of his mind considerably improved. Previous to the 22d of July, '41, the defendant, in a conversation with the witness, told him the complainant was crazy, and believed it to be on account of a young lady then named.

On cross-examination, this witness answers that he heard the complainant say previous to the dissolution, that the firm had done a losing business; he also heard him say he had \$15,000 surplus, and again in June or July, that he believed he had injured the defendant, and would be glad to get out of the firm. From the commencement of the firm's business until June '41, the complainant was attentive to business and applied himself closely to it; from June until the dissolution he paid little or no attention to the business of the store, but spent the days during that period in walking about the streets from one house to another. At the time of taking the deposition, the complainant was the same as he was previous to June '41, and was in this condition on his return in April '42. The village of Prairie Bluff in June and July '41, was extremely sickly, and the care and responsibility consequently devolving on the defendant, by complainant's absenting himself, was burthensome and oppressive.

Mr. Ellis, at the time of taking his deposition, had known the complainant five years—the annual sales of the firm were about \$25,000, and the partnership continued for some two years. Witness considered the complainant insane at the date of the agreement, that is, in June and July '41—for a month or two previous to the 22d July, and afterwards, his acts were different from those of a man of sound mind—about that time he neglected his business, spent most of his time in striding up and down the street—he frequently went into merchants' stores, and even behind their counters, opened their books and examined them without permission, then went out without making any remark. This the complainant had never done previous to June, '41, so far as the witness knew. He also appeared very restless and melancholy—often spoke about the business of his concern, stating it was doing a losing business—that he had made a purchase of goods on too short payments, so that it would be difficult to

meet them—this was his constant theme, and he also, at the same time stated the profits of the concern were from ten to eighteen thousand dollars—the complainant left Prairie Bluff the 2d of August, '41, and was absent about six months—the condition of his mind is better now than it was when he left. Witness had never seen the complainant drunk much. About June, '41, he heard the defendant say, the complainant was neglecting his business and drinking too much, and he wished the complainant would either go back to his business at the store, or go to the defendant's plantation and shoot squirrels, so as to quit his present habits.

On cross-examination, this witness deposes that he heard the complainant say, his reason for not answering letters written by the defendant when in Maryland was, that he did not wish his friends there to know that he had been intemperate in this State. With reference to taking some money, the the complainant had taken it to bear his expenses, and charged himself with it. Afterwards he returned it to the iron chest, supposing he should not go, and erased the entry; subsequently he took the money and renewed the entry. This was done the 2d of August, '41. The witness deposed also to the complainant's conversations, in which he said he was afraid the firm had done a bad business, and that it was unprofitable. At the same time he said the firm had made a profit of ten or fifteen thousand dollars—that he had injured the defendant in the management of the business—that in his last purchases he had made a very bad selection of goods in New York, and had made the payment of the notes on so short a time, that it would be difficult to meet them, and thereby he would injure the defendant. These conversations took place before he left for Maryland. The complainant's recollection now, of occurrences which took place at and before the dissolution is good. On re-examination, the witness is positive, the complainant, in June and July, '41, was not competent to transact his own, or the business of the firm.

Mr. Hall had known the complainant for six or seven years. About the 22d July, he appeared to be different in his general and private conduct from what he was and had been six months previously. His conduct was different from

that of a man of sound mind. Witness came to this conclusion, from the manner in which he neglected business, and from the manner in which he spoke of it—stating the firm was doing a bad business, and that he was injuring the defendant by his last purchase of goods. He strolled about town at times when he should have attended to business,—talked strangely of himself and business, sometimes saying he was better, then again that he was worse. He also said he had the horrors, and that he sometimes drank too much. His mind, after his return from Maryland, was in its usual condition, and as it was previous to June, '41. He heard the defendant say, previous to July 22d, '41, that something was the matter with complainant—that he was afraid he was going crazy about a young lady then named, and if he did not do better the defendant would have to dissolve the firm, but did not wish to do so, because it would embarrass the business, and would injure him much. Defendant wanted the complainant to go to his plantation, and remain there until he became more steady, for he had discovered the complainant drank too much, and for this reason he had locked his cellar. In the same conversation, the defendant said, he could compel the complainant to remain and close the business, but he did not know but it would be better to let him off.

On cross-examination, this witness stated, that at the instance of complainant and defendant, he went to Wetumpka, to ascertain the chance of selling a stock of goods there—the proposition was made by both. The complainant went to Dayton, and said he was going to look out a location to sell part of the stock of goods. This was about the time the goods were received. Witness has been a merchant—saw the stock of goods, and thought at the time they were too many for the market. Heard both parties say they had bought too many goods. Witness does not think it possible for the firm to have paid bills maturing in October from a stock of goods purchased in April. He heard the complainant say previous to the dissolution, but not afterwards, the firm was doing a losing business, and was afraid he was injuring the defendant.

On the re-examination by the complainant, the witness

states, he heard the complainant say that he drank too much, but the witness did not remember that he ever saw him drunk. During the period previously spoken of, the witness did not think the complainant, at times and periods, competent to attend to business correctly.

Doctor Fant testified, he was acquainted with both parties since '40 ; that during a portion of June and July, '41, the complainant's condition was different from what it had been previous to that time—could not say that it was different from that of a man of sound mind and memory ; cannot form any comparison of complainant's sanity or insanity from witnesses previous knowledge of him. Cannot speak of him professionally, as he never was called in. As a physician, he does not think that persons who have been insane are apt to recollect, after the mind is restored, all that occurred during their insanity. On cross-examination, the witness testified, he was not intimate with the complainant at any time, nor does he know that the complainant drank to excess ; believes he was under the influence of liquor more or less ; never saw him drink, but has seen him when witness believed him to be under the influence of liquor—his conduct now is more calm and composed than it was about June and July, '41—he now looks rational, and so far as the witness knows, he talked so then—he is not in the state now, that he was then.

Mr. Holt testified, the complainant boarded with him in July, '41, and he, during that month, acted like a man usually does when he is about half drunk ; he never believed the complainant was unsound in mind, further than the influence of liquor. Witness knew his habits up to 22d July, '41—saw him drinking off and on for about six weeks previously, and in the opinion of witness the complainant during that time, was under the influence of intemperate drinking ; the effect this had on him was, to cause him to neglect his business, and to stroll about the streets. When the complainant returned, his mind was about like it was prior to the period he took to intemperate drinking.

This witness, on cross-examination, testified, he heard the complainant say, after his return from Maryland, he would be satisfied with his settlement with the defendant, if the

latter would give him a certain note left in the iron chest, due from him to defendant, and also convey to him a lot of ground which he had previously conveyed to defendant, before he went to Maryland. Previous to the dissolution, the witness heard the complainant say he had injured the defendant in the purchase of the last stock of goods on two short payments; that Dexter had sued the defendant for a large sum, and defendant would not be able to meet the payment for the goods, and by that means the firm would be embarrassed, and complainant wished to get his name out of the firm.

Mr. Radcliff testified, he was a merchant, doing business at Prairie Bluff; during the period of the alledged insanity of the complainant, his acts and conduct induced witness to suspect his sanity; during that time, he several times came to witnesses store, went behind the counter, turned over and looked through the witness' books, would then pass out without any apparent motive or design. For the purpose of satisfying himself, the witness, as to the complainant's unsoundness of mind, he asked him what was the matter, and the complainant said sometimes he had the horrors, at other times the firm was broke—on other occasions he would insist on witness going over to his store, and purchase goods at New York cost. Witness did go at different times, and make purchases, but after suspecting complainant's insanity, was induced to resist further importunities on such terms. Witness believes, at that time the complainant was laboring under insanity. So far as the witness knew, the complainant was a man of sobriety. On his return he was sane. Witness heard the defendant speak of the complainant's insanity previous to 22d July, '41. Defendant said he did not know what was the matter with the complainant, unless he was in love with a certain young lady.

In answer to cross interrogatories, this witness testified, the complainant told him he had borrowed the index from one of defendant's clerks, and had copied off the names of customers. He showed witness some of the amounts opposite the names, which he had put down from recollection—he said he did not know he had it exactly right, but if he could get a fair shake at the books he could have it so.

Mr. Wilkins testified, the complainant's general conduct was such as to induce him to believe his mind somewhat affected, but did not consider him quite insane—he talked a great deal about his business, and would frequently leave it when his services were apparently needed. Witness knows the complainant's habits, and thinks he was intemperate for some time previous to the dissolution; thinks intemperance was one cause that affected his mind, and that when under the influence of liquor he would appear very stupid, and frequently sleep all day. This witness speaks of a similar declaration by the defendant, that the complainant was crazy, and his belief of the cause of it. Also, of the complainant's admissions as to bad purchases, and his desire to get out of the concern as he commenced.

Mr. Borden testifies, that he has known the complainant for six years, but was not intimate with him at the 22d July, '41; he was however well acquainted with him, and had been for two years. About that time, he appeared as usual, only not quite so attentive to business. Witness believes he was of sound mind, and very anxious to quit business.—His habits at that time were not good; he was seen drunk, and face very much bloated, and witness was very much surprised at his looks, until he found out his drinking; his general conduct appeared like a man destitute of any prospective business, and he would not apply himself to any duties of the store. Witness has no doubt he was as much sane as he generally appeared for the last three years. Witness has been clerk to the defendant since the dissolution.

On cross-examination he testified the complainant had applied to witness to rent his storehouse; this was a short time before the dissolution, he said to witness he would take it if he could divide the stock then on hand; that he had been doing a losing business for some time, and that he was glad to get out of the business; heard the complainant say, both before and after the dissolution, he had been doing a murderous business; that he had better been clerking for about \$200 a year than to have been in the firm.

Mr. Cook believed the complainant was not of sound mind—the circumstances which led him to this conclusion were, in the first place, what rumor had said about him, and of his

abandoning business, when previous to that time he was very active and attentive; next walking about town, loafing, and other times setting at one place for a considerable time, with a melancholy face, and stroking his hand through the hair of his head.

Mr. E. H. Cook, has known the complainant during the whole period; has had but little conversation with him since his return, but witness thinks he is more rational than when he left—the complainant has always talked rational to him; does not now act as he did in July, '41.

H. T. Brantly, knew the complainant, but was not intimate with him; can't say he has ever seen him act differently from a man of sound mind; has seen him look dejected; he looks now as he usually did, except the appearance of dejection is gone..

Mr. Dehart, was acquainted with the complainant intimately, in July, '41; about that time the acts of complainant would sometimes induce the witness to believe him unsound, but on other occasions he appeared rational. Some of the acts which induced this belief were, that he would sometimes say his head was deranged; again, that he wished he was dead—besides this, he totally abandoned his business, and did many other things which induced witness to think him unsound in mind. Upon the whole, his opinion was wavering, sometimes he thought the complainant of sound mind, and at others unsound—never saw the complainant drinking or drunk, and believes he was temperate.

Mr. Dexter testified, that he was absent from Prairie Bluff, in June and July, '41, but knew the complainant intimately in April and May of that year; during those months his conduct manifested a disordered mind, but witness never could discover any defect of memory; the tenor of his conversation was confined almost entirely to the business of the firm, saying that the firm had been doing a bad business previous to that time; that the purchase he had recently made in New York, was too large in amount, injudicious in the selection, and must inevitably result in considerable loss to the defendant; during part of April, and all May, the complainant did not attend to the business of the firm with the diligence formerly practiced, and was frequently walking about the streets to

the neglect of his business. About that time the complainant said his mortification was such, on account of the disastrous condition of the business of the firm, that he was at times tempted to commit suicide, and that if he had a sum of money at his disposal, to remunerate the defendant, he would give up the whole, if it took the last dollar he had, and that he would be glad to get out of the concern on any terms. Such conversations, and such acts induced the witness to believe him [disordered in mind; whether the assertions made by him were true, the witness does not know.

On cross-examination, this witness deposed, the complainant had told him he purchased the stock of goods in New York, with a view to its division, and that by so doing, he could settle the affairs of the firm more advantageously to himself—has never been able to discover the slightest defect in memory of the complainant, and believes his recollection is good as it ever was.

Mr. Bryan was present as a witness to the deed for the lot, executed in July, '41; its value was from eighty to one hundred dollars—saw no consideration pass—the complainant was sober and calm; the deed was executed early in the morning; witness was intimately acquainted with the complainant; about that time he acted differently from his usual manner, but in the opinion of witness this arose more from derangement of feeling than reason; he seemed melancholy from disappointment in business, for it was to business alone he attributed his feelings; complainant said no one could tell what he suffered. About this time witness saw the complainant under the influence of liquor; according to his belief, liquor produced the same effect on him as on other men; he was sane, so far as the witness knows. Witness was also called as a witness to the deed of dissolution. Complainant was calm and sober, and so far as the witness knew, was sane. Witness was clerk to the firm; has heard the defendant say he thought the complainant was crazy, or would go crazy about Miss ———. When the witness was called in the complainant had the deeds spread out before him, and was examing them. Witness went on with him as far as Halifax, N. C., and his conduct on the route was the same as that of travellers generally, except that he was melancholy,

dejected and reserved. Previous to the dissolution the complainant said he was a fool for not going out of the firm in January, 1841, for then the defendant would have given him \$3,000 for his share of the profits, and have closed up the concern himself. Also, that his last purchase was so bad it would absorb about all the profits that had been made, and the defendant be injured, therefore the complainant was willing to go out without a dollar; his condition now is as it was formerly, with the exception of melancholy and drink; his recollection of occurrences which took place about the time of the dissolution, is good.

Mr. Robbins testified the conduct of the complainant was such as to induce him to believe him either love-sick, insane, drunk, or a fool. In '40, he was familiar with the witness, and wished to sell him goods, but in the spring or summer of '41, his conduct altered—he was less anxious to sell the witness goods, and once when he was walking the streets, with his hands in his pockets, and head down, the witness stopped him to talk about buying goods, but he turned off in an indifferent manner, which insulted witness. On another occasion, the complainant came to witness' house, and his manner then was such as to induce the witness to ask him what was the matter; he then said he believed he was most crazy, and wished he was dead. Witness asked him if he was not love sick, but he said no, but wished he was dead.

On the part of the defendant several witnesses were examined, and the substance of their testimony bearing on the question of insanity may be thus stated:

Mr. Marsh heard the complainant say, in June, '42, that he took to drink before the dissolution; and the reason was to bring that about, because the defendant had not put in the firm the amount of money agreed on, but instead took money-out, and thereby embarrassed the concern; that the people here thought him crazy, but he knew well what he was about; that he took the course he did to get out of the concern; he admitted he had made bad purchases in New York, and in consequence of these drawbacks on the business, he did not care much what he did. He said the profits of the firm were \$15,000.

Mr. Bennett has heard the complainant speak of the disso-

lution as a matter in course. In June, 1842, he said the profits were \$15,000; that previous to the dissolution he would not attend to business, in order to get out of the firm; that when in New York, he had laid in a supply of goods badly, in order to embarrass the concern; that defendant had not treated him properly; that complainant said he had laid in the stock of goods too much of one quality; that the stock might be divided, he taking part, and the defendant the other, but to this defendant objected; he also said he would be satisfied with the settlement, if defendant would make him a title to a certain lot of land which had been his, and give him certain notes which were his individual property, and which were left in his trunk when he went to Maryland. Subsequently he stated to witness the profits of the concern were \$20,000 or \$25,000, and that he was insane at the time of the dissolution, and did not know what he was doing. Witness was in company with complainant a short time before he left; if he was insane, witness did not know it, and if drunk, witness did not see him drink; at times the complainant appeared more stupid than usual.

Mr. Williams testifies that in July, '41, he with his wife made some purchases at the store, and after the goods were measured off, the complainant asked him if he had not confessed a judgment in favor of another person, and on receiving an affirmative answer, said he did not feel disposed to let him have any more goods on credit; witness then proposed to give back the goods, but the complainant refused to take them, but said the next he got he must pay down; that he thought the witness had more to pay than he would be able to pay.

Mr. Hazzle had business to transact with the complainant about the 22d July, '41; that he was at all times capable of transacting the business with witness.

Mr. Chadwick was in company of the complainant about that time; he appeared cast down; his countenance was different from what it used to be, but when questions about trading were asked him, he would answer as usual.

Mr. Whatted dealt a good deal with the firm; the complainant appeared to him to be sensible. After the dissolu-

tion, and before he left for Maryland, the complainant said he had quit business; that he had risked too much; in answer to an inquiry if the defendant had settled with him, he said he had settled up like a gentleman.

Mr. B. Bennett saw the complainant frequently about the time alluded to; never has seen any alteration or difference since he first knew him; has heard the defendant say the complainant was in great trouble of mind about Miss ———.

Mr. Burgess Bennett states the complainant spent a night with him about the last of June or first of July, '41; he said the business was involved, and the firm would not be able to meet its payments; that he had purchased so many goods that the firm could not sell enough to meet its payments, and he wished to get out of the firm. Witness did not see any thing wrong about his mind, only that he appeared distressed on account of his business; his talk and actions did not differ from what they ordinarily were. Witness had no inducement to invite complainant to his house, and none was given until the complainant remarked that he would go out with him as he was walking. Never saw the complainant drunk, or knew of his drinking.

Mr. Johnson is a merchant at Prairie Bluff, and was in '39, '40 and '41; has heard the complainant frequently say previous to the dissolution, his firm had not made any thing; since the complainant's return, he has heard him say the firm had not made a dollar, and that all he wanted was for the defendant to pay up its debts. Witness left Prairie Bluff on the 8th June, '41, and did not return until October; he never saw any difference in complainant up to the time witness left, the complainant attended to business as usual; before witness left, he bargained with complainant for a bale of domestics, which the defendant refused to let him have, alledging the complainant had sold it too low, and remarking he was drunk, in love, or crazy.

Mr. Lore was a clerk in the concern at the time of dissolution; he was in the house when the articles of dissolution were signed; the complainant acted as a rational man, and seemed to understand his business. He was not attentive to his business; according to the rates at which goods were sold, the business could not have been profitable; complain-

ant was not at all times so insane, drunk or foolish, as not to know what he was about ; at times he was despondent, and under the influence of liquor. In a conversation with complainant since his return, he said his intention was, when buying the stock of goods, to divide them with the defendant, and if he had succeeded in doing so, he would have had the defendant where he wanted him ; witness slept in the same house with complainant ; he was under the influence of liquor a portion of the day, but got up sober ; he slept composedly ; his conduct about this time differed from his former conduct in this, that he would go up stairs and spend a portion of the day.

Mr. Marshall saw the complainant frequently about the time alluded to, when he considered him under the influence of liquor ; at times he appeared sober, and at others acted as a drunken man.

Mrs. Hall saw the complainant drunk once ; she noticed his conduct was different from what it formerly was, and complainant told her it was caused by liquor.

Mr. Coates is one of the subscribing witnesses to the deed of dissolution, and the deed for the lot ; he considers the complainant at the time they were executed was sane as he ever was, and knew as well what he was doing as he ever did ; he said at the time he had as fine an opportunities for making money as any young man in the country ; that he had fooled them away by selling goods at such short profits as not to make any thing ; after his return to Alabama, the complainant said he was perfectly satisfied with the settlement, with the exception of the lot and one or two small notes given him for individual services ; the lot he should and must have back. In May or June, '41, the complainant expressed to witness his desire to get out of the firm, and his reasons were, that it was embarrassed by his last purchases ; these were made in March and April, at from four to eleven months, and made the firm unable to meet its engagements out of its own means. From frequent expressions of this wish, the witness believed it was the choice of the complainant to go out of the firm ; witness was clerk and book-keeper for the firm ; heard no conversation between the parties when the deeds were signed about the agreement, but had heard

both speak of it separately; the complainant did not read it, nor was it read to him in the presence of witness; he was called in by defendant, who stated what the writing was; it was in his hand-writing, as was also the deed; the parties were standing by the desk, and the paper lying on it before them.

Mr. Parsons is a resident of Maryland; states the complainant was clerk for him from the fall of '41 till January '42; he came there some time in the summer or fall of '41; witness was intimate with him; had known him fifteen or twenty years; had constant business relations with him whilst there; witness regarded him as perfectly rational the whole time; heard the complainant complain that defendant had either cheated him or was about to cheat him; said he had been engaged in business, but it was unprofitable owing to defendant's conduct; he conversed and acted as a reasonable and sensible man, and made an excellent clerk.

Mr. Maddox was also a resident of Maryland; was intimate with the complainant during the time he was there; was then perfectly sane; heard him say he had made money in trade, but ultimately was unsuccessful.

Mr. Lockwood states that he traveled with the complainant from Prairie Bluff by the river to Montgomery; had a conversation respecting his leaving; complainant said he thought the firm had lost money in trade, and in leaving, he had left the defendant to pay the debts; that he took but \$125; witness remarked that would be scarcely sufficient to pay his expenses where he was going; complainant then said the defendant had urged him to take more, but he would not, because he thought the defendant would lose enough by the business if he paid the debts; during the passage he conversed rationally and sensibly; he seemed dejected, and had the appearance of having been unwell.

Mrs. Holt states her belief that the complainant was under the influence of ardent spirits about the time alluded to; he admitted he was so, in a private conversation with her.

By the articles of co-partnership the complainant was to devote his whole time and attention to the business, and receive one-third of the profits. The articles of dissolution recite the withdrawal of the complainant on account of his

health, and the defendant to release him from all claims for losses, in consideration of having all the assets of the firm. They also recite the receipt by Smith of \$100, in full discharge of all claims for profit, &c. The evidence before the jury was substantially the same as that previously detailed.

E. W. PECK, for the plaintiff in error, made the following points upon the errors assigned; and these open the whole case in all its aspects:

1. The mere fact that the issue here directed was found for the complainant, is not sufficient to sustain the decree. The object of an issue is to aid the conscience of the chancellor in a case of doubt and difficulty, but he is not bound to regard it. [Murlock v. Murlock, 1 Edwards, 18; Barker v. Ray, 2 Russ. 68.]

2. In this case, no issue should have been directed, as the case is neither of doubt or difficulty, when the evidence is looked into. The legal presumption is of sanity, [State v. Martin, 2 Ala. Rep. 48; 3 Bro. Ch. 441,] and if all the facts proved were pleaded, the ecclesiastical courts would not let the party in to proof. [Cartwright v. Cartwright, 1 Eccl. R. 51; Atto. Gen. v. Panther, 3 Bro. C. 441; Hoff. Ch. Prac. 502; Townsend v. Graves, 3 Paige, 438; Whalley v. Whalley, 3 Bligh.; Kennedy v. Kennedy, 2 Ala. 44; Johnson v. Hainsworth, 6 Ala. 450.]

3. There is no evidence of fraud, circumvention, imposition, or undue advantage, upon which a court of equity will interfere. Indeed, the fraud is all on the other side, as shown by the proof of design to embarrass the firm, and thus cause the dissolution.

4. If the conscience of the chancellor is to be governed by the verdict, a new trial should have been awarded, as it is clear there was no ground for the verdict on the proof before the jury.

5. The New York practice is for the party complaining of the verdict to state the evidence, and for the other party to correct it, and it is finally settled by the judge in case of dispute. [1 Hoff. Ch. Pr. 513.] The English practice is for the judge to certify the evidence from his notes. [2 Smith's Ch. Pr. 87.]

The court will judicially notice that the judge does not take notes, and the New York practice was pursued in this case.

J. A. CAMPBELL, contra, insisted that the evidence of insanity was sufficient to make out the complainant's case, [Combe on Ment. Derang. 196; Ray on Med. Jur. 142; 3 Curtis, 671; 2 Adams, 99,] and if so, a lucid interval was not shown. [1 Bro. Ch. 234; 2 Poth. on Ob. 579; Ray on Med. 322.]

The evidence of the fact of execution is not satisfactory, in connection with the other proof. [4 Pick. 32; 2 Phill. 69; 1 Hagg. 414; Ray, 243.]

The admissions of the complainant after his return do not affect the case; they only display ignorance, and that he labored under delusion. They were inadmissible, because they were not put in evidence. [6 C. & F. 39; 1 Molley, 352; 7 C. & F. 372; 6 Price, 240.]

The contract shows imposition, as the firm had done a large and prosperous business. The basis (according to Atwood's answer) of the settlement, was the accounts made up in April; the firm was then not only solvent, but entirely unembarrassed. The gross inadequacy is evidence of fraud. [1 Story Eq. 197 to 220; 2 Kent's Com. 450; Fonb. 47, 115 to 119.]

The court of chancery will not grant a new trial against the certificate of the judge, [Gibbs v. Hooper, 8 Con. Ch. R. 32,] nor will an appellate court generally reverse the opinion of the chancellor, [Bourke v. Bothwell, 2 B. & B. 56,] and great value is always given to the verdict of a jury. [1 Barbour's Ch. Pr. 461.]

As to insanity, the court of chancery invariably orders issues. [Stork on Non. Com. 27; 2 Beavan, 116.]

GOLDTHWAITE, J.—1. It is urged by the counsel for the complainant, that the usual practice of courts of chancery now is, to direct an issue at law, whenever a defect of capacity is relied on to set aside a contract otherwise valid. It seems the rule is thus stated by a recent annotator. [Stork on Non Com. 27.] We have looked into the cases cited by

this author, but cannot perceive they sustain his proposition to the extent asserted. [Att'y Gen. v. Panther, 3 Bro. C. 441; Hall v. Warren, 9 Vesey, 604.] The other case, 2 Beavan, 116, is not before us at this time, nor do we deem it essential to look particularly to it, as we presume it can scarcely go beyond the apparently well settled practice. No one, we presume, would contend a party was entitled to demand an issue, or that the court was required to direct one, if the proof was clear, or if no proof was made. It is very clear, on principle, as well as authority, that an issue is only directed in those cases where doubt is produced in the mind of the chancellor, either by the nature of the proof itself, or by reason of conflicting evidence. Whether there are cases in which some peculiar party is entitled to have an issue, it is unnecessary to inquire, as those, if they exist at all, are confined to heirs at law contesting a will, or when the establishment of a *modus* is the question. [1 Eq. Ca. Ab. 133; Harrington v. Hunter, 1 Bro. P. C. 140: but see also 1 Young, 243, and O'Conner v. Cook, 6 Vesey, 671.] It is useless to examine the adjudications bearing on this subject in detail, as that was done in Kennedy v. Kennedy, 2 Ala. Rep. 625, in which the rule as above stated is ascertained, on a review of the principal cases.

2. There is no question the verdict of a jury upon the issue directed to be tried at law, is entitled to great consideration; but it is also entirely evident, that no weight whatever can attach to it, when the proof before the chancellor, in the first instance, did not warrant him in directing the issue—or in other terms, when the case made at the hearing was such as to entitle the one party or the other to an immediate decree. Such in our judgment is this case, and whatever of uncertainty was in our minds at the argument, has entirely vanished upon a cautious consideration of the evidence. It appears the complainant began to act strangely and unusually about the first of June, '41, and in the opinion of some of the witnesses was then deranged. The conduct from which this derangement was inferred, seems chiefly to be his neglect of business—his strolling about the streets at night, as well as by day—looking into the books of other merchants without their consent—together with much talking about

his own affairs and business. Now if these acts stood alone, without explanation, it seems to us it would be extremely unsafe to say there was a total aberration of mind ; but when we look further to the evidence, all is sufficiently explained, and may be easily traced to its proper and legitimate cause. Those who associated with him in the common habitudes of eating and sleeping, state their knowledge—not opinions merely—that he drank, and was frequently under the influence of spiritous liquors. Those who dealt with him speak of his performing the mental operations then called in play with the ordinary vigor, and the subscribing witnesses are certain he was calm and collected when he signed the deeds—or, as both of them assert, was perfectly sober. The principal act performed, and which he now seeks to avoid, seems to have been long contemplated, as well as desired by him. It is evident enough from his own declarations, as well as the other evidence, that the stock of goods purchased the spring previous to the dissolution, was not judiciously laid in, and therefore there was a possibility of his embarrassment, if not the certainty of his eventual loss. There seems to us nothing unreasonable in his wish to get out of the concern as he came into it, when the whole matter is looked to in a pecuniary view. Independent of this, we find him ten days after the dissolution, conversing of it in a rational manner, and apparently satisfied he had done well in getting rid of the business. He travels to Maryland a rational man—is employed there as a rational being—and returns after a lapse of a few months entirely restored, even to those who previously considered him as insane. It is not too much to say, that this is a most extraordinary case if one of insanity. In all this it will be observed, there is no conflict of evidence—no statement by one witness of facts which are inconsistent with those stated by others. The only conflict is, in the opinion of the witnesses as to his real condition, and we think it perfectly clear, the impressions of these were well founded, who attributed his eccentricities to the influence of liquor.

3. There is another view of the case, which has been somewhat pressed. It is said the defendant took advantage

of the unfortunate condition in which his partner had placed himself, and made an unconscionable bargain. There is no proof satisfying us that this was the case. It is doubtless true, the firm had made money previous to laying in the last stock of goods, but the share coming to the complainant, was but a third, and he was bound to devote the whole of his time to the business. When we take into consideration the prospect of loss upon the stock—the delay in closing the business; and that the defendant would be called on to give his attention to it, when by the articles of copartnership, he was to be relieved from any duties whatever, we cannot say any advantage was taken of the complainant. We do not deem it necessary to go further into the case, as what we have said is sufficient to indicate that the bill of the complainant is not sustained by the evidence, as no sufficient doubt was produced to warrant an issue.

The decree of the chancellor is therefore reversed, and the bill dismissed with costs.

COMELANDER v. BIRD.

1. A party may prove that the note sued on, was given in consideration of the purchase of a brick-yard, and that the vendor agreed in consideration of the sale, not to make bricks in the town of Cahawba.
2. The promises being independent, the agreement not to make bricks in the town, could not be pleaded in bar of the action, but evidence of the fact would be admissible, to reduce the damages.
3. Testimony that the bricks made by the defendant were not marketable, would be admissible on the part of the plaintiff, to show that the defendant had sustained no injury by the plaintiff's breach of the contract; but he could not show merely, that his bricks were of better quality than those of the defendant.

Error to the Circuit Court of Dallas.

ASSUMPSIT by the plaintiff in error, on a promissory note, made by the defendant to him, on the 7th September, 1843, for the payment on the first January, 1846, of \$200.

The defendant pleaded—1. Non-assumpsit. 2. Payment. 3. Failure of consideration. 4. Partial failure of consideration; and nine other pleas which are not necessary to be here set out, as the same questions arise upon the evidence. The plaintiff demurred to the last ten pleas. The court sustained the demurrer to the fourth plea and overruled it, as to the remaining nine pleas.

Upon the trial before the jury, the defendant introduced a witness to prove that the note sued on, together with two others, one for \$200, and one for \$150, had been given for a brick-yard in the town of Cahawba, and the good will of the trade, and that the other notes had been paid. It was proved that the plaintiff had executed a deed to the defendant for the brick-yard, and put him in possession of the same. The defendant offered to prove that the plaintiff, at the time of the sale of the brick-yard, and as a part of the contract for the same, verbally agreed with the defendant, that he would not make any more bricks for sale in the town of Cahawba, and that there had been a breach of this contract on the part of the plaintiff. The plaintiff objected to this testimony, but it was admitted, and he excepted.

The plaintiff then offered to prove, that the defendant had not sustained any loss by the breach of the contract for the good will of the trade, by showing that the bricks made by the defendant were of so inferior a quality, that they could not be sold in the market, which evidence the court ruled out, and the plaintiff excepted.

These matters, together with the overruling of the demurrer to the nine-special pleas, is now assigned as error.

EVANS, for plaintiff in error.

ORMOND, J.—The admission of the testimony objected to, did not violate the rule, that parol evidence is inadmissi-

ble to add to, or vary a written contract. The contract for the good will of the trade, does not appear to have been reduced to writing, though it constituted, with the sale of the brick-yard, the consideration of the notes. The conveyance of the brick-yard, was not the contract of the parties, nor does it profess to be so. The proof then, that the plaintiff agreed not to make bricks for sale in the town of Cahawba, was merely proving the consideration of the notes.

The nine special pleas, set forth in different aspects this contract, by which the plaintiff agreed not to make bricks in the town of Cahawba, and that in violation of the contract, he did make bricks and sell them, to various persons, by means whereof the defendant sustained damage to the amount of the note in suit. The contract of the defendant to pay the price agreed on, and that of the plaintiff not to carry on the business of brick making at Cahawba, are wholly independent, and upon well established principles it follows, that a breach of the agreement by either, would be no bar to an action by the other; and from this it results, that these pleas were not well pleaded in bar of the action, and the demurrers to them should have been sustained.

But although the breach of the agreement by the plaintiff, was no bar to his action on the note, yet we think the proof was admissible in reduction of the damages. This question has been several times before this court, and in *Ready and Banks v. The Mayor and Aldermen of Tuscaloosa*, 5 Ala. 337, we say, "it is certainly consonant to justice, that a party should be permitted, when sued for a breach of his contract, to reduce the damages by showing the injury he has sustained by the failure of the other party to comply with the contract on his part, instead of driving him to his cross action, thereby multiplying suits, and increasing litigation without any corresponding benefit." These remarks are peculiarly applicable to this case. If the defendant was induced to purchase the brick yard, in the expectation that he would not have to compete with the plaintiff, and if by such competition he afterwards sustained a loss, it is manifest he should not be compelled to pay for a benefit which he did not receive.

The question being what injury the defendant had sus-

tained by the breach of the plaintiff's contract, it was certainly competent for him to show that the breach of the contract had done the defendant no injury. This he proposed to do, by proving that the bricks of the defendant were of so inferior a quality, that they could not be sold in the market. We do not think the plaintiff could evade his contract, by making bricks of a better quality than the defendant, but if he could prove, that the defendant's bricks were so inferior that they were not marketable, and would therefore have remained on his hands if the plaintiff had not manufactured and offered a better article, it would prove that the breach of the contract had done him no injury.

Let the judgment be reversed and the cause remanded.

CHANDLER v. McPHERSON, ET AL.

1. In an action for a malicious prosecution, in procuring the plaintiff to be indicted, &c. the defendant may repel the imputation of having prompted the prosecution, by proof that the persons who appeared as prosecutors before the grand jury, first took the advice of a lawyer upon the facts, and were informed by him that the indictment could be sustained.
2. Although the defendant in an action for a malicious prosecution may not be able to show a probable cause for prosecuting the plaintiff, or the plaintiff may prove a state of facts from which the want of it is inferable, yet if the defendant acted under an honest belief that the plaintiff was guilty of the offence for which he was charged, no recovery can be had against him.

Writ of Error to the Circuit Court of Randolph.

THIS was an action at the suit of the plaintiff in error, to recover damages of the defendants for maliciously, and without any reasonable and probable cause, procuring the plaintiff to be indicted for a felony, &c. The cause was tried on the

plea of "not guilty," with leave to give any special matter in evidence, which might be pleaded in bar—a verdict was returned for the defendants, and thereupon judgment was rendered.

The plaintiff excepted to the ruling of the court. It appears from the bill of exceptions, that the plaintiff introduced evidence tending to show that the defendants procured one F. Formby, (a female of bad character,) and her husband to appear before the grand jury of Randolph, and indict and prosecute the plaintiff as charged in his declaration. Thereupon the defendants proposed to show by an attorney and counsellor at law, that Mrs. Formby, previous to the finding of the indictment, stated to him certain facts, tending to implicate the plaintiff as therein charged; that the attorney, &c., on hearing her statement advised her that she could sustain a prosecution. The defendants were not present, and did not hear this conversation and advice. To the admission of this evidence the plaintiff objected, but his objection was overruled, and the same was permitted to go to the jury.

The court charged the jury, if they were satisfied from the evidence, that the defendants in procuring the plaintiff to be prosecuted on the charge expressed in the declaration, were not influenced by malice, but acted under an honest belief that the plaintiff was concerned in the act for which he was prosecuted, then they could not find against them, although there was no probable cause for the prosecution.

S. F. RICE, for the plaintiff in error, made the following points. 1. The true question in actions for malicious prosecutions, is not whether the defendant had *probable cause to believe* the plaintiff guilty, but whether there existed a probable cause for the prosecution, no matter whether the defendant knew of its existence or not. [Hickman v. Griffin, 6 Missouri R. 38; Mowry v. Miller, 3 Leigh's R. 565; Alexander v. Hutchinson, 9 Ala. R. 825; Horton v. Smelser, 5 Blackf. R. 428.]

2. The charge given, if not clearly erroneous, could not fail to mislead the jury, by making *the belief of defendants*

as to plaintiff's guilt, a prominent matter in their inquiries. [Sims v. Sims, 8 Porter's Rep. 449; Toulmin v. Lessesne, et al. 2 Ala. R. 359; Merriam v. Mitchell, 13 Maine R. 439; Sugg v. Pool, 2 S. & P. 196.]

3. Malice may be actual, or *merely implied*; recklessness, or a want of due regard to the rights or feelings of others, is enough. And the jury have the right to infer malice from the want of probable cause. The *intent* of the defendant is a question for the jury alone. [Costillo & Keho v. Thompson, 9 Ala. Rep. 937; Merriam v. Mitchell, *supra*; Sugg v. Pool, *supra*.]

4. The evidence of the witness, Hudson, was irrelevant; mere hearsay is *res inter alios acta*; every way illegal; having no connection with either party to this suit, and shedding no light upon the true question in the cause, viz: whether there existed a probable cause for the prosecution. [5 Blackf. 428, above cited.]

L. E. PARSONS, for the defendant in error. 1. The fact that an attorney at law had advised the witness she could sustain a prosecution for the burning of the mills, after hearing her statement, was properly permitted to go in evidence; for it tended to rebut the idea, thnt in going before the grand jury she was instigated by the defendants.

2. But admitting she acted at their instance, it was still proper to show that she was acting under legal advice. [Turner v. Walker, 3 Gill & J. 377; Blunt v. Little, 3 Mason, 102; Stone v. Swift, 4 Pick. 389.]

3. The charge of the court is unexceptionable; for both malice and want of probable cause are necessary to sustain this action. [Kelton v. Bevins, Cooke's R. 90; Caudler v. Petit, 2 Hall, 315; Murry v. Long, 1 Wend. 140; Bell v. Ursury, 4 Litt. 334; 2 Dana, 425; 1 Wend. 345; 7 Cow. 715.] It is admitted that malice may be inferred from want of probable cause, [Kirksey v. Jones, 7 Ala. R. 622,] but the want of probable cause cannot be inferred from the most express malice. [Murray v. Long, 1 Wend. 140; Ib. 345.] And the defendants could not be required to prove a probable cause, until the plaintiff had *proved express malice*.— [Frowman v. Smith, Litt. Sel. Cas. 7.]

COLLIER, C. J.—It is said that two things are essential to the maintenance of the action for a *malicious prosecution*, and must always concur, viz: *malice* and *want of probable cause*; for if there be no *malice*, though there be no *probable cause*, yet no action lies. If there was no *malice* and no *probable cause*, the defendant was merely mistaken in causing the prosecution to be instituted. [2 Dane's Ab. 723, 724, 728, and cases there cited; 2 Saund on Plead, & Ev. 654, 659, 662.]

In Lindsey v. Larned, 17 Mass. Rep. 190, the court said, that malice is a necessary ingredient in an action of this nature. There none was imputable to the defendant—but being anxious to recover a debt, he took those measures, and those only, which under the best advice he found adapted to that purpose, without any apparent desire to vex and harrass his debtor, although the proceeding may have had that effect. [See also, 4 Mass. Rep. 433; 2 Munf. R. 23; 1 Hals. Rep. 166; 3 Hawk. R. 545.] So it has been held, if a man prosecute another for *real guilt*, no matter how malicious his motive may be, he is not liable in an action for malicious prosecution; nor is he liable if he prosecute him for *apparent guilt*, arising from circumstances which he honestly believes. [3 Hawk's Rep. 66; see also, 2 Dev. & Bat R. 360; 12 Pick. R. 324; 9 East R. 361; Meigs' R. 84.]

It is an acknowledged rule that malice may be inferred from the *want of probable cause*, but the want of probable cause cannot be inferred from the most express malice. [1 Wend. Rep. 140, 345; Cro. Jac. Rep. 133; 1 B. & P. Rep. 205; Dane's Ab. 724; 2 Starkie's Ev. 911 to 916, and citations in notes.]

In Blunt v. Little, 3 Mason's Rep. 102, Mr. Justice Story said, "it is certainly going a great way to admit the evidence of any counsel, that he advised a suit upon deliberate examination of the facts, for the purpose of repelling the imputation of malice, and establishing probable cause. My opinion however is, that such evidence is admissible, although it is sometimes open to the objection stated in Hewlett v. Cruchley, 5 Taunt. R. 277.] But it appears to me, that a necessary qualification of the admission is, that it should appear in proof that the opinion of counsel is fairly asked, upon the real

facts, and not upon statements which conceal the truth, or misrepresent the cause of action. [See also, *Turner v. Walker*, 3 G. & Johns. Rep. 377; *Ravenga v. McIntosh*, 2 B. & C. Rep. 693; *Stone v. Swift*, 4 Mass. Rep. 389.] In the case last cited, it appeared upon the trial, that the defendant had consulted counsel: and the court said, it appears that the defendant had acted upon advice of counsel. If he did not withhold any information from his counsel, with the intent to procure an opinion that might operate to shelter and protect him against a suit, but on the contrary, if he being doubtful of his legal rights, consulted learned counsel with a view to ascertain them, and afterwards pursued the course pointed out by his legal adviser, he is not liable to this action, notwithstanding his counsel may have mistaken the law. So it has been held, that the representations made to the defendant by third persons, as to the plaintiff's guilt, are admissible for the defendant, as showing a probable cause, though such representations prove unfounded. [4 Verm. R. 363; see also, 2 Munf. R. 23; 1 Hals. R. 166; Buller's N. P. 14; Cro. Jac. R. 194; 6 Bing. R. 183.]

The case of *Merriam v. Mitchell*, 13 Maine R. 439, we understand, decides that the assurance of the defendant of the guilt of the plaintiff, however strong it may have been, if founded upon his own error, or mistake in point of fact, or proceeded from his own negligence in acquiring information, cannot be regarded as probable cause to justify a prosecution against an innocent and unoffending man, who had given no color for suspicion against him. *Hickman v. Griffin*, 6 Miss. Rep. 37, goes quite beyond any other which our industry has enabled us to find. There the court say the real point of inquiry is, whether there was probable cause to believe the plaintiff guilty, or whether he had probable cause to institute the prosecution, not whether he believed he was guilty. See further, 1 Stew. Rep. 39; 2 Stew. & P. Rep. 151, as to the necessity of malice on the part of the defendant to entitle the plaintiff to recover.

In *Seibert v. Price*, 5 Serg. & W. Rep. 438, it was said, in

an action for a malicious prosecution, the question of probable cause should be submitted to the jury, not upon the fact of the guilt or innocence of the plaintiff, but upon the defendant's belief of his guilt or innocence. [See also *Swaim v. Stafford*, 4 Ired. L. R. 392.]

Having stated the legal principles which are necessary to guide us to a conclusion, we will now address ourselves specially to the ruling of the circuit court as drawn in question by the bill of exceptions. We think the testimony of the legal adviser of Mrs. Formby was admissible, not for the purpose of relieving the defendants from the imputation of malice, for there is no evidence to show that they were cognizant of this advice; but the testimony might have been considered by the jury, upon an inquiry whether Mrs. F. was influenced by the counsel of the attorney, or the prompting of the defendants. It may be that the defendants first instigated the prosecution, yet the prosecutor may have availed herself of the *locus penitentiae*, and would not have become an actor but for the professional advice she received. If this hypothesis be well founded, then the defendants cannot, with any propriety, be said to have *caused* or *procured* the prosecution of the plaintiff, although they may have urged it; and no recovery could be had against them, even if the proof of malice, and want of probable cause were satisfactorily established.

The only cases that have come under our notice, which seem opposed to the charge to the jury, are those cited by the counsel for the plaintiff in error, from 13th Maine and 6th Missouri Reports. The former seems to consider that an error or mistake resulting from *crassa negligentia* either warrants the implication of malice, or is in law a substitute for it. However this may be, we will not stop to inquire, as there are no facts recited in the bill of exceptions to show that the same question was presented in the present case. As for the latter decision, it stands "solitary and alone," unsupported by any citation in the opinion in which it is found,

and contradicted by many of the cases we have referred to. It may be safely affirmed as a general rule, that although the defendant in an action for malicious prosecution may not be able to show a probable cause for prosecuting the plaintiff, or the plaintiff may prove a state of facts from which the want of it is inferable, yet if the defendant acted under an honest belief that the plaintiff was guilty of the offence for which he was charged, no recovery can be had against him. This conclusion is so clearly sustained by the authorities cited, that further argument is not necessary to illustrate it. The ruling of the circuit court is in accordance with the views we have expressed, and its judgment is consequently affirmed.

BROUGHTON v. ROBINSON.

1. Under the statute which allows one surety when sued by the common creditor to have judgment against his co-surety, it can be given only for one-half the sum of the creditor's judgment, notwithstanding the surety not sued may have received a full indemnity from the principal debtor.
2. The judgment in favor of one surety against the other is not dependent on the payment of the money, but on the judgment being obtained against him by the common creditor, and is allowed as a means to compel the co-surety to contribute to the payment of that judgment, and should be entered without condition.
3. The proof prescribed by the statute to be made at the trial, refers to the trial of the suit between the creditor and the surety sued by him, but this proof at that trial is unnecessary, when issues are formed between the sureties on the notice of motion of the one sued by the creditor.
4. When such issues are tendered by the defendant in the motion, it dispenses with the proof required to be made in the creditor's suit, and the judgment entry between the sureties need only show the matters necessary to sustain the jurisdiction of the court, as in other cases of summary proceedings.
5. In proceedings under this statute, the judgment entry should show—1. The pendency of a suit by the common creditor against the surety making

- the motion—2. That he has notified his co-surety in writing of the pendency of the suit—3. That judgment has been rendered, and its sum in the creditor's suit—4. In judgments by default—that proof was made at the trial of the creditor's suit, that notice in writing was given to the co-surety, and also that the parties were sureties—and 5. When the judgment is for more than an aliquot portion of the debt—that the other co-sureties are insolvent to the number necessary to support the particular sum for which judgment is given.
6. A statement in the judgment entry that the common creditors' judgment was obtained on a verdict at a day which appears to be after trial, in which notice of its pendency was given to the defendant, will warrant the inference that it was pending at the time of the notice, that appearing to be some thirty days anterior to the judgment.
 7. Although the common creditors' suit is against two of the sureties, one of whom in point of fact is insolvent, the solvent creditor is notwithstanding entitled to his motion against a co-surety not sued.
 8. Under the statute, when notice is given by the surety sued to another not sued, the judgment of the common creditor, in the absence of fraud and collusion, is conclusive of the liability of the surety, and ascertains the amount of contribution between the sureties.
 9. Although the judgment itself under such circumstances is conclusive, it is no error if the plaintiff introduces other regular evidence. Record evidence of the liability of the principal debtor, by the production of the creditors' judgment fixing his liability, is admissible, though unnecessary.
 10. Where a surety is sued by the common creditor, and the statute of limitations runs out pending the suit, this is no defence by a co-surety to a motion by the surety against whom the creditor has obtained judgment. The liability as between sureties does not accrue until one has paid the common debt.

Writ of Error to the Circuit Court of Monroe.

MOTION by Robinson, against Nathaniel Broughton as a co-surety.

The notice is directed to Nathaniel Broughton, and is in these words :

“ You will please take notice, that suit has been brought against me in the circuit court of Monroe county, in favor of Benjamin Fitzpatrick, Governor, for the use of E. W. Roberts, administrator *de bonis non* of Wm. C. Cooledge, on a certain bond given by Edward T. Broughton, Nathaniel Broughton, John R. Davis, William Robinson and Samuel Bozeman. Said bond dated 31st of August, 1837, payable

to Hugh McVay, acting Governor, and in the penal sum of \$10,000. That said cause is now pending, and will be held for trial at the next term of the circuit court of Monroe county, to be held, &c. at which time I shall move for judgment against you as a co-surety on said bond." This is dated 5th October, 1846, and was served the 20th of the same month.

The defendant pleaded in short by consent—1. Non-assumpsit. 2. Payment. 3. Set off. 4. Statute of limitations applicable to sureties of sheriffs.

The judgment entry recites that the plaintiff, in support of his motion, showed to the court the notice above set out, executed on the defendant more than ten days previous to the term. The original bond made by Edward T. Broughton as principal, and the other parties named in the notice as sureties, bearing date as before stated, and conditioned for the faithful performance by said Broughton of the duties required of him by law as sheriff of Monroe county. The record and proceedings in the orphans' court of Monroe county, showing that Broughton, by virtue of his office as sheriff, was appointed administrator of the estate of William C. Cooledge; that said estate was duly declared insolvent; that on the 24th March, 1845, said orphans' court rendered a judgment in favor of E. W. Roberts, administrator *de bonis non* of said Cooledge, against said Broughton for \$25,574; that afterwards, in July, 1845, an execution issued to, and was returned by the sheriff of Monroe county, no property. The record and proceedings of a certain cause determined at the then present term, wherein Fitzpatrick, Governor, for the use of E. W. Roberts, administrator *de bonis non* of said Cooledge was plaintiff, and William Robinson and John R. Davis were defendants; this suit being founded on the said official bond, and in which the plaintiff recovered judgment on verdict the 12th November, 1846, for \$7000; and the defendant pleading, thereupon came a jury, who being sworn, &c. upon their oath do say, we find for the plaintiff, and that his claim is not barred by the statute of limitations; that the parties above named as sureties of Broughton were his sureties; that Broughton, by virtue of his office, was appointed administrator of said Cooledge; that Broughton, after the

expiration of his term of office, placed in the hands of the defendant property worth \$6054, to indemnify him and the other sureties on said bond; that Edward T. Broughton and John Davis are insolvent, and that Samuel Bozeman is dead, as well as his estate insolvent. It was therefore considered by the court, that the plaintiff recover of the defendant the sum of \$6527 for his damages, besides costs, for which execution may issue; and that the clerk indorse on said execution that the money on it be paid to E. W. Roberts, administrator of William C. Coolidge, to be credited on his judgment against Robinson and Davis, unless said Robinson shall have paid said judgment against himself and Davis, in which event, to be paid to said Robinson.

At the trial, the plaintiff offered in evidence a judgment in the county court of Monroe, on the 24th March, 1845, in favor of E. W. Roberts, administrator *de bonis non* of the estate of William C. Coolidge, against Edward T. Broughton, former administrator of the same estate, by virtue of his office as sheriff. This was objected to by the defendant, but admitted by the court.

The defendant proved that the term of office for which Broughton was elected, would have expired by limitation on the first Monday of August, 1840, and that he resigned his office four days previous thereto, and then ceased to discharge its duties.

The court was asked by the defendant to charge the jury, that the statute of limitations applicable to sheriffs' sureties was a bar to the plaintiff's recovery in this action. This was refused.

The court then charged, that if the suit against Robinson and Davis was commenced before six years from the resignation of Broughton had elapsed, the statute was no bar to plaintiff's recovery in this motion, although the motion was instituted more than six years after such resignation.

The defendant excepted to the admission of the evidence objected to, as well as to refusal to charge as asked, and to the charge given.

He now assigns as error—

1. There was no proof of the execution of the sheriff's bond.

2. That there was no proof that the bond found by the verdict was the same bond on which Broughton's liability had accrued.

3. That the court erred in admitting the record of Broughton's appointment as administrator of Cooledge.

4. In admitting the records of that court, showing the insolvency of that estate.

5. In admitting the judgment obtained against Broughton by Roberts as administrator *de bonis non*.

6. In the charge given, and refusal to charge as requested.

7. Because the verdict does not conform to the pleadings.

8. In not finding the amount of damages.

9. Because it finds matters not put in issue by the pleadings.

10. Because the judgment does not pursue the verdict.

11. Because no judgment should have been rendered on the verdict.

12. Because it is rendered for a sum certain, when no damages are assessed.

13. Because there is no sufficient verdict to support the judgment.

14. Because it is rendered for the entire debt recovered of Robinson.

15. Because the judgment is conditional, and in the alternative.

16. Because the plaintiff, if the judgment stands, will contribute nothing to the common debt.

17. Because the judgment directs execution before the plaintiff has paid any thing.

18. Because it should have been rendered only for one-half the sum recovered from the plaintiff.

19. Because the judgment directs the money to be paid to Roberts, who is no party to the record.

BLOUNT, for the plaintiff in error.

LESLIE, contra.

GOLDTHWAITE, J.—1. We think this case will be most conveniently considered by ascertaining the general

principles which should govern it, rather than to separately examine the many assignments of error.

The statute under which the motion was made allows the recovery by one surety, when sued by a creditor, against another not sued, and directs, "that it shall be lawful for the person thus sued to notify in writing, his co-surety or sureties, or either or any of them, of the pending of the suit; and it shall be the duty of the court, &c., before which the said suit is to be tried, on proof being made at the trial that notice in writing has been given to said co-surety or sureties, and that the said parties are sureties, to enter up judgment in favor of the surety sued, against such co-surety or sureties, each thus notified as aforesaid, for the proportion of said debt or demand, with costs, which such co-surety or sureties should pay; that is to say, in case there is but one co-surety, then judgment shall be rendered in favor of the surety sued, for one half of said debt or demand, and costs; if there are two co-sureties of the person sued, then for one third; and at that rate according to the number of co-sureties: *Provided, however*, that if any of said co-sureties are insolvent, the surety thus sued as aforesaid, may on said motion, to be made as above, recover a judgment against said co-surety or sureties, thus to be notified, the proportion which said co-surety or sureties should pay, if such insolvent co-surety or sureties were not bound for said debt or demand." [Dig. 533, § 12.] This act is so precise as scarcely to present room for construction, and it is difficult to conceive how the court below could, in view of it, have arrived at the conclusion the plaintiff was entitled to judgment against his co-surety for more than one half the sum recovered from him. The circumstance that the principal debtor had previously deposited property in his hands for the common indemnity of all the sureties, does not, in our opinion, warrant the court in this summary mode of proceeding, from giving judgment for a different portion than the statute directs. In order to compel the defendant to make the proper application of this property, or the funds derived from it, the plaintiff has other and appropriate means to which he must resort.

2. Having ascertained a substantial error in the proceedings, we must go further, and see if sufficient matter appears to enable us to correct the judgment, in the event the other errors alledged at the trial are not sufficient to work its reversal, and to do this, the whole statute must be construed. It is scarcely possible the intention of this legislation could be to allow the surety moving against another surety, to collect the sum recovered until he had himself paid it to the creditor, unless as a means to compel the other surety to relieve him from the burthen of paying a just proportion of the common debt. The surety proceeded against would at all times have it in his power to restrain the judgment against himself by paying the common creditor the sum for which it was rendered. And consequently the evil is more apparent than real, when it is apprehended the surety would pocket the money, and leave the common debt unpaid. If the surety was compelled to pay the common debt before he could sue execution on this statutory judgment, he might well nigh be ruined by the delay. It is this view which probably induced the enactment, and thus permit the execution to run at the instance of the surety, so as to leave in his hands the power to compel his co-surety to make payment either to himself or the common creditor, and if he will not relieve himself by the latter course, we incline to think he would not be heard to restrain the latter, on the apprehension that the money, if paid to him, would not be applied to the surety debt. There seems therefore no reason for appending any condition to the judgment; and if by any possibility the one added to this could affect the rights of the defendant, it would be here corrected. It is unnecessary to consider what its effect is in the conclusion we shall arrive at.

3. Another important question in the construction of this statute is, whether a judgment can be given on the motion of the surety, until one has been rendered against him in favor of the creditor. The statute, although it does not expressly declare this condition, evidently implies it, when it prescribes, that *on proof being made at the trial*, that notice, &c. has been given, judgment shall be entered against the one surety against the other. The trial which is here spoken

of, evidently is that of the suit between the common creditor and the surety sued by him. The importance of this proof, and its connection with the right of the plaintiff to recover upon motion, will be considered in another point in the case.

4. It will be seen the statute provides no mode by which questions of fact shall be determined between the sureties themselves, yet it cannot be supposed the intention was to cut off the defendant from the right to investigate such questions. We think for this reason the act must be construed as defining what proof shall be made when the defendant to the motion, does not demand or tender an issue. When he does this, there seems to be no valid reason why the proof should first be made at the trial of the suit instituted by the creditor, and afterwards on the trial of issues growing out of the specific motion. In the present case, it appears the defendant contested the right of the plaintiff to a recovery, and tendered several issues. This, in our judgment, relieved the other party from all necessity to prove the particular matters required by the statute, in the trial of the suit of the creditor, and brings the case within the influence of the decisions of this court, which require in all summary motions, that the judgment of the court shall be sustained by the record, so far as to show the circumstances which confer the jurisdiction, whether the judgment is by default or otherwise, but leaving the facts, when an issue is formed, to be determined by the verdict, as in other cases. [Curry v. Bank of Mobile, 8 Por. 370; 5 Ala. 26.]

5. Looking then to the statute, it will be seen the circumstances which are necessary to confer jurisdiction are—1. That a suit shall be pending against some person who is a surety to a bill, note, bond, covenant, or other instrument in writing. 2. That he shall have notified his co-surety, or sureties, in writing, of the pendency of the suit. 3. That judgment has been rendered in the creditor's suit, and for what sum. 4. In judgments entered against the co-surety by default—that proof was made at the trial of the principal cause, that notice in writing had been given to the co-surety, and also that the parties were sureties. And, 5. When

the judgment is for more than an *aliquot* portion of the debt—that the other co-sureties are insolvent to the number necessary to support the particular sum for which judgment is given.

6. Although there is much immaterial matter contained in this entry, it will be found to contain substantially the recital of all the necessary allegations as indicated above, except the fourth, which became immaterial in consequence of the issue between the parties. The only point on which we are compelled to rely upon an inference is, that the suit by the common creditor was pending when notice of the motion was given by the plaintiff to his co-surety. With respect to this fact, the entry states that judgment was given on verdict, on the 12th November, 1846, during the same term at which the motion was tried. In view of the ordinary course of practice, we think the necessary intendment must be, that this suit was pending when the notice was given.

7. There is only one other matter in connection with the motion, to which it is necessary to advert. It will be seen the common creditor when suit was pending, had included two of the sureties in it, and that one of them was shown to be insolvent, as well as all the other sureties to the bond, except the parties to this motion. It may be questionable if the plaintiff, under these circumstances is precisely within the *letter* of the statute; but we think he is clearly within its spirit and intention, as the object evidently is to give *any* surety the right to compel any other co-surety not sued, to contribute to the common burthen, according to the rule in equity, and cannot be defeated by the circumstance that the creditor has joined in his action another surety, who in point of fact is insolvent.

8. Having thus disposed of the construction of the statute, we shall apply ourselves to the bill of exceptions. There can be no doubt the statute intended, in the absence of collusion or fraud, to make the creditor's judgment against the one surety conclusive in the motion by him against his co-surety whenever the notice in writing of the pendency of the suit, and the fact the parties were sureties was shown, and this would seem the rule in actions at common law. In *Cave v. Burns*, 6 Ala. Rep. 780, we said, with reference to

the obligations arising between sureties, that "each impliedly agrees with the other, to protect him to the extent of the joint undertaking against the consequences arising out of the failure of the principal." They stand to each other then in the relation of indemnitors, and when one has notice of the suit against the other, if the one not sued omits to furnish the other with the information necessary for the common defence, he is in no condition to complain of injury, for his contract is to bear the burthen jointly and equally. The rule obtains in several of the States, that even without notice a judgment against the one to be indemnified is *prima facie* evidence, although the better rule is said to be, that notice is essential. [See cases collected in Cowan & Hill's Notes, 817.]

9. But although the judgment itself is conclusive, it will not follow there is error when the endeavor is to make the case by regular extrinsic proof. This we presume was the effort when the judgment in favor of Roberts, as administrator *de bonis non* of Coolidge against the sheriff, as the former administrator was offered as evidence. This, coupled with proof of a devastavit of the assets, would show a breach of official duty, and thus fix the liability of the sureties to the extent of the assets thus wasted. In this view the evidence was admissible, though it certainly appears to be entirely unnecessary.

10. The remaining question, upon the charge of the court was ruled at least as favorable for the defendant as the law will allow. If, as we have before said, the judgment of the creditor, after notice of the pendency of the suit, is conclusive upon the surety not sued, there is an end of the question, because the defendant did not take the necessary steps then to induce his co-surety to interpose the defence. In point of fact, however, the defence seems not then to have arisen, or rather the suit was commenced by the creditor against the plaintiff before the statute had run.

Under these circumstances, the statute creates no bar as between these parties. The contract between the sureties, as we have already seen, is one for mutual protection and indemnity, consequently there can be no breach until a payment has been made by one on the common account. In *McBroom v. Governor*, 6 Porter, 43, we say with reference

to the bar of the statute of *non claim*, that the rights of a surety as against the estate of his principal, does not accrue until the payment by him on account of the secured debt. We think the law is the same between co-sureties. There was therefore in our judgment, no error in the instructions of the court, or its refusal to charge as requested. This disposes of the entire case, for although several of the assignments of error are not specifically noticed, it will be seen they call in question matters which received no notice at the trial, or do not arise in the case. The result of our opinion is, that the judgment should be reversed, because it is entered for the wrong sum, but as the whole record, or rather the judgment entry, furnishes the necessary material to enter the proper judgment, it will be rendered here for \$3,500, with interest from the 12th November, 1846, and costs, unless the plaintiff shall elect to have the cause remanded. Judgment accordingly.

COMEGYS v. McCORD.

1. An assignee in bankruptcy cannot sue in the State, or federal courts, after the lapse of two years from the time of the declaration and decree in bankruptcy, if the cause of action had then accrued, to recover the property of the bankrupt.

Error to the Circuit Court of Lowndes.

DETINUE for two receipts, given by one Thomas Barlow, to one John T. Beckley, for certain promissory notes by the plaintiff in error, assignee in bankruptcy, against the defendant in error.

Upon the trial, the plaintiff offered, and read in evidence a

transcript from the district court of the United States, held at Tuscaloosa, by which it appeared that J. T. Beckley filed his petition for the benefit of the bankrupt act, on the 4th May, 1842, and in his schedule, as rendered in by him, rendered the two receipts given by Barlow to him, for notes, accounts, &c. for which this suit is brought, and that on the 7th December, 1842, by the decree of the said court, he was declared a bankrupt, and that on the 25th May, 1843, said decree was confirmed and a certificate ordered to issue. It was also proved, that the receipts sued for were in the possession of the defendant, and their value.

The court charged the jury, that unless the plaintiff had commenced his action within two years from the 7th December, 1842, he could not recover in this action.

The plaintiff asked the court to charge, that the *lex fori* governed in this case, as to the statute of limitations, and that it required six years to bar the plaintiff's action, from the time his cause of action accrued.

Also that the statute did not commence running until the 25th May, 1843, the date of the final decree; which charges the court refused, to which, as well as to the charges given, the counsel for the plaintiff in error excepted, and now assigns as error.

BOLLING, for plaintiff in error.

1. State courts have jurisdiction of actions by the assignees of bankrupts, under the United States bankrupt law. [Joshua A. Wood, assignee, v. Solon Jenkins, and others, No. 12, vol. 8, Law Reporter, April No., 1844; Brown v. Cumming, 2 Caine's Rep. 33; Sullivan v. Bridge, 1 Mass. 511.]

2. The *lex fori*, as to the statute of limitations, must govern. [Goodman v. Munks, 8 Porter, 84.]

3. By the passage of the bankrupt law, Congress did not limit or confer the jurisdiction of the State court. [Peck, et al. v. Jenness, et al. Law Reporter, No. 7, vol. 8, Dec. 1845, p. 360.]

G. B. STONE, contra.

ORMOND, J.—The eighth section of the bankrupt act provides that “no suit at law, or in equity, shall in any case be maintainable, by or against such assignee, or by or against any person claiming an adverse interest, touching the property, or rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued.”

Assuming that the suits contemplated by this section, may be maintained by the assignee in bankruptcy, either in the State or federal courts, we think it very clear, that the limitation must apply, no matter in which court it is brought. The limitation is general, prohibiting suits by or against the assignee in any court after the lapse of two years, and it would defeat the object in view, to permit this to be evaded by suing in the State courts.

It is equally clear, that the statute commences running from the date of the declaration and decree in bankruptcy, if the cause of action had then accrued, and not from the date of the final decree, discharging the bankrupt from his debts, and granting the certificate. This is manifest not only from the language employed, but also because it is the declaration and decree of bankruptcy, spoken of in the first section of the act, which vests the property of the bankrupt in the assignee, who may immediately commence suit, without waiting for the final action of the court confirming the previous decree, which is final against the bankrupt. It is perfectly clear therefore, that the statute begins to run from that time. The charge of the court below being in accordance herewith, its judgment must be affirmed.

LEIGH & Co. 'v. LIGHTFOOT.

1. Where the copy of the bill indorsed on the protest differs in some one or more words from that declared on, and produced at the trial, the protest should, notwithstanding, be allowed to go before the jury, that the plaintiff may show, by other testimony, the identity of the copy with the original adduced.
2. Where the declaration alleges that the bill declared on was drawn at Leighton, in Lawrence county, on the drawees at Mobile, and the bill produced at the trial was dated Leighton, and addressed to the drawees at Mobile, it sufficiently appears that it is an *inland bill*, which need not be protested to entitle the plaintiff to recover the sum expressed on its face with interest; but unless there is a protest the statute damages cannot be recovered.
3. As the statute makes the certificate of a notary in the protest of an inland bill, that he had mailed a notice of the dishonor, addressed to the drawer at a certain post office, evidence of the fact, if the protest and notice recited therein are regular, the holder may prove on the trial that the notice was addressed to the proper office.
4. In an action on a bill of exchange against the drawer, the court charged the jury, "that the bill of exchange which had been read to them, and the certificate thus admitted, was testimony for them to consider, as evidence of the protest of said bill, and notice to the defendant:" *Held*, that as the protest was admissible evidence, though perhaps insufficient in itself, the charge was not erroneous, that if the defendant desired other, or explanatory instructions, he should have prayed the court to give them, and charge the jury explicitly as to the effect of the evidence.

Writ of Error to the County Court of Lawrence.

THIS was an action of assumpsit at the suit of the defendant in error, against the plaintiffs, as the drawers of a bill of exchange. The first count of the declaration is on the bill, to which are added the common counts. On the trial, the plaintiff offered in evidence the bill declared on, which is as follows: "Leighton, 1 March, 1843—\$1171 78. Twelve months after date of this, my first of exchange, second of the same tenor and date, pay to the order of John L. Townes,

eleven hundred and seventy-one 78-100 dollars, value received, which please charge to the account of

Your ob't servant,

WM. LEIGH & Co.

Acceptance waived.

Messrs. Tartt, Stewart & Co., Mobile."

Plaintiff also adduced a bill of the following tenor: "Leighton, 1 March, 1843—\$1171 78. Twelve months after date of this, my first of exchange of same tenor and unpaid, pay to order," &c., being in all other respects as the above. The last bill was read from the same paper, on which there was a protest for non payment by the drawees, made by a notary of the city and county of Mobile, on the 4th day of March, 1844, and the notarial protest certifies that it was a true copy of the original bill, of which he demanded payment of the drawees, and transmitted to the defendants by mail, a notice addressed to them at Leighton. To the reading of the protest and bill thereon copied, the defendant objected, but his objection was overruled, and the same were permitted to go as evidence to the jury.

The court charged the jury, that the bill of exchange that had been read to them, and the certificate of protest, "was competent testimony for them to consider as evidence of the protest of said bill, and notice to the defendant, no other proof being produced, save that Leighton was the post office at which defendants usually received their letters. To the ruling of the court, and the charge given, the defendants, by their counsel excepted," &c. The jury returned a verdict for the plaintiff, and judgment was rendered accordingly.

T. M. PETERS, for the plaintiffs in error, insisted that the protest should have been rejected as evidence, because it did not identify the bill. The jury could not know, in the absence of suppletory proof, that the bill declared on, and that protested, were the same. It is not denied but the discrepancy was susceptible of explanation by the testimony of the notary, or other evidence, but as this was not done, the protest was insufficient and irrelevant. This view is in harmony with the decisions relied on by the defendant in error in 11 Wheat. Rep. 431; 12 Mass. Rep. 6; 7 Ala. R. 205. The

copy of the bill is affirmed to be literal, and the slightest variance is sufficient to exclude the protest. [1 Chit. Pl. 302; 1 Stark. Ev. 478; Step. Plead. Ap. 130.]

There is no proof that the bill sued on, is an inland bill, and the plaintiff has treated it as a foreign bill. The waiver of acceptance is not an admission that the drawees had no funds of the drawers, and does not dispense with protest and notice of non-payment. But if it does, and the bill is a foreign one, then it would not be admissible under the common counts without protest and notice.

J. B. SALE, for the defendant in error, contended that the variance between the bill declared on, and that copied on the protest, was altogether immaterial, and even if carried into the notice sent to the drawers, it would not make the notice insufficient. There can be no doubt but the evidence should have been allowed to go to the jury, and the court, instead of instructing them to consider of its sufficiency, might have charged that it was sufficient. [11 Wheat. Rep. 431; 12 Mass. Rep. 6; 7 Ala. Rep. 25; Rob. Louis. Rep. 161.] If the defendants had drawn another bill of the tenor of that copied on the protest, they should have proved it. [3 Por. Rep. 353.]

The notice of the dishonor of a bill is sufficient, if by express terms or necessary implication, it imports the requisite facts. [Story on Bills, § 390; Chit. on Bills, 466 to 470.] But the waiver of acceptance dispensed with the notice of non-payment—it indicated that the drawers had no funds in the drawees' hands, or at least that they never expected the bill to be honored. [15 Mass. Rep. 69.]

The bill is an inland bill, and the protest was unnecessary to entitle the plaintiff to recover; [8 Porter Rep. 142; 2 B. Monr. Rep. 262; 5 Johns. Rep. 375; 2 Bay's Rep. 376;] and but for the statute the notarial certificate would not be evidence that notice was transmitted. [Clay's Dig. 380, § 9; 7 Ala. Rep. 108; 6 Wheat. Rep. 572.] The notary's certificate in the present case affirms that notice was duly mailed and addressed to the defendants at Leighton.

COLLIER, C. J.—In the Branch Bank at Decatur v.

Rhodes, at this term, the bill on which the defendant was charged as an indorser, was drawn on "Gamble & Murray," and that copied on the protest was addresseed to "Gamble & Murrah;" the circuit court excluded the protest, because it did not correctly set forth the bill. We said it was certainly the correct practice to copy the bill upon the protest, yet if it were not literally transcribed, but the protest identified it by a description so minute as to leave no ground for mistake, we should be inclined to hesitate before we would pronounce against it. Without however, deciding whether the protest was in itself *sufficient* to prove the dishonor of the bill, we were of opinion that it was *competent* to show by extrinsic proof the identity of the bill indorsed, with that protested; and consequently the evidence was improperly rejected—the admission of the protest being necessary that the assistant testimony might follow. The case cited is a direct authority that the evidence now drawn in question was rightly admitted.

To entitle the plaintiff in the case before us to recover, it was not indispensable that the bill should have been protested. The declaration alledges that the bill was drawn at Leighton, in Lawrence county, on the drawees at Mobile in this State. This shows that it is an inland bill, which it is only necessary to protest to entitle the holder to the damages consequent upon its dishonor. But if nothing appeared to the contrary, should it not be intended that it was an inland bill, and would not the *onus* in a proper case devolve upon the party interested, to show that it was payable out of the State where drawn, so as to make a protest indispensable evidence of its dishonor? *Besides*, are not the courts of this State charged with a knowledge of the fact that Leighton is a village at which there is a post office, and Mobile an incorporated city, and also county—all situate in the State? There can be no question but a notice which described the bill as it was copied on the protest, would be sufficient to charge the drawers. In *Mills v. The United States Bank*, 11 Wheat. Rep. 431, it was held that no precise form of notice to the indorser of a promissory note is necessary—that it need not state who is the holder, nor will a mistake as to the date of the note vitiate the notice, if it convey to the party a

sufficient knowledge of the particular note which has been dishonored. That the notice need not formally alledge the note was demanded at the place where it was payable—if it states the fact of non-payment, and that the holder looks to the indorser for indemnity, it is sufficient. In *Smith v. Whiting*, 12 Mass. Rep. 6, a notice given to the indorser of a promissory note payable at a bank was held sufficient, which was given on the day it fell due, although it stated the maturity of the note to have occurred three days before, and although the name of the promisor was mistaken in the notice. True, in that case, it was in evidence that the indorser was liable on no other note in bank; but it can hardly be believed that the result would have been otherwise, if this assistant proof had not been made.

Moorman v. The Bank of Alabama, 3 Porter's Rep. 353, was an action against the second indorser (of which there were three) of a foreign bill. "Byron" was the third indorser, but in the copy on the protest the name was written "Pyron." The cashier of the bank which had purchased the bill testified that there was no other bill of the same tenor and date, and that it was forwarded to New Orleans, the place of payment, for collection. The court thought it a "legal inference," that the protest related to the bill in question, and that the notary committed a mistake in placing the name of Pyron for Byron on the protest; that the defendant being an indorser prior in order to Byron, could not be prejudiced by the mistake, even if it discharged the latter. Accordingly, upon a demurrer to evidence, it was held the plaintiff was entitled to judgment. There can be no doubt, but the relative position of the parties' names on the bill would have induced the same conclusion, without the testimony of the cashier.

We have seen that the protest was admissible evidence, that it might have been assisted by parol testimony if necessary, that a notice as explicit as the protest would be sufficient to advise the drawers of the dishonor of the bill, and that being an inland bill, it was not indispensable to entitle the holder to recover the amount of it with interest, that it should have been protested. It remains now to consider the charge to the jury, which is thus stated in the bill of excep-

tions, "that the bill of exchange which had been read to them, and the certificate of protest thus admitted, was testimony for them to consider as evidence of the protest of said bill, and notice to the defendant." The statute makes the affirmation by a notary in the protest of an inland bill, &c. that notice of its dishonor had been sent by mail to the persons entitled to it, evidence of the fact; and the additional proof that the post office to which it was transmitted, was that, at which the drawers usually received their letters, was sufficient to charge them, if the bill and protest was evidence to be considered by the jury. [2 Stew. & P. Rep. 428.]

We think there can be no doubt but it was competent for the jury to weigh this evidence and determine upon its effect: this is what the court instructed them was their appropriate duty. They were not informed that it was sufficient in itself to authorize them to find a verdict for the plaintiff. If the defendant had desired a charge upon this point, he should have prayed the court to give it. The omission to instruct a jury upon all the legal questions suggested by the proof in a cause is not a ground for the reversal of a judgment rendered on their verdict; it is enough if the court does not mistake the law, or lay it down in such manner as necessarily to mislead them. [1 Ala. Rep. N. S. 18-607; 2 Id. 694; 4 Id. 493.] In *The State v. Brinyea*, 5 Ala. Rep. 241, it was said, if a charge is considered objectionable, either on account of its obscurity, or tendency to mislead a jury, the party against whom it is to operate should ask an explanation of the court, otherwise an appellate court will not reverse the judgment for either of these objections to the charge, if it is substantially correct. And in *Knapp v. McBride & Norman*, 7 Ala. Rep. 19, we said, "There can be no question but a party has the right to require the opinion of the court upon any point of law that is pertinent to the issue, and the refusal of the court to give such an opinion would be available on error. *But the mere neglect or omission* of the judge to instruct the jury on some material point, though it might sometimes furnish just ground for a new trial, will not warrant a reversal of the judgment." We need not inquire whether the variance between the bill declared on and that copied on the protest is not so unimportant as to have war-

ranted the jury in considering that the bill in suit was that to which the protest applied; for however this may be, we have seen that there is no error in the ruling of the circuit court. This view relieves us from the necessity of considering what evidence would have been sufficient to support the common counts. We have but to add, that the judgment is affirmed.

WEAVER v. PURYEAR & WILLIAMSON.

1. An action may be commenced by attachment, to recover for a breach of warranty, of the soundness of a slave.

Error to the County Court of Dallas.

Suit commenced by attachment by the plaintiff in error.

The two first counts of the declaration, are upon a warranty of soundness of a slave, sold by the defendants to the plaintiff, at the price of seven hundred dollars, to which are added the money counts. The defendants refused to plead to the declaration, and suggested to the court that the first and second counts of the declaration, are not admissible under the attachment sued out in this case, for a money demand, and moved the court to strike therefrom the declaration, which motion was granted by the court, and the plaintiff excepted.

The defendants then pleaded to the common counts, and upon the trial the plaintiff offered in evidence; as the foundation of his action, the following instrument :

“ We have this day bargained and sold, unto Philip J. Weaver, a negro man named Green, whom we warrant to be sound and healthy in every respect, and title good, for the

sum of seven hundred dollars." And also offered to prove, that the slave at the time of the sale, was unsound and of no value. This testimony, on motion of the defendant, was rejected by the court, and the plaintiff excepted.

BOLLING, for plaintiff in error.

EDWARDS, contra.

ORMOND, J.—The question presented by the record is, whether an attachment will lie upon a breach of warranty of the soundness of a slave.

By the custom of London, which is the original of the statute regulations upon this subject, foreign attachment would not lie, but in those cases where debt, or indebitatus assumpsit could be maintained.

Our statute uses the terms, "debt or demand," and requires the plaintiff, or his agent, "to swear to the amount of the sum due," and as this could not be done, where the damages were uncertain, it would seem to follow, that an attachment would not lie. We do not think however, it was the intention of the legislature, to confine this remedy to those cases where a debt, in the technical sense of the term existed, as on that supposition there was no necessity for the introduction of the term "demand," into the act. The design of the attachment law was, to compel an appearance, in those cases where personal service of the process could not be effected, and we think the reasonable, and just interpretation of the act is, that this remedy was given in all cases of contract, when by the terms of the contract, or by the law acting upon it, the sum due, or the damages to which the party was entitled upon a breach of the contract, was ascertained. If this construction is not put upon the law, the party in such a case as this, will be driven into chancery, when adequate redress could be more speedily obtained in a court of law.

In this case, the damage for the breach of warranty, is the value of the slave at the time of the warranty. [Willis & Robertson v. Dudley, at this term.] This is a sum capable of ascertainment, and of which the plaintiff might make affidavit. It is within the very letter of the statute, a "demand," and as it arises out of the contract of the parties, and the

measure of the damages is ascertained by the law of the contract, it comes fully within the definition as here given.

A similar view is taken of the attachment law of Pennsylvania, by Judge Washington, in *Fisher v. Consequa*, 2 W. C. C. Rep. 382, which like ours, speaks of "debts and demands." In that case, the defendant bound himself to deliver to the plaintiff teas of a particular quality, suited to a particular market, and on failure to do so, to pay the difference between teas of such quality, and such as should be delivered. Such teas as the contract called for were not delivered, and the plaintiff swore that the difference amounted to \$4500; it was held that the attachment would lie. So also, in *Hunt v. Norris*, 4 Martin, 517, it was held, that the master, and owners of a vessel, were liable to an attachment at the suit of the shipper for goods lost through neglect, upon the ground, that the obligation arose out of a contract of bailment. And in *Clarke v. Wilson*, 3 Wash. C. C. R., that it would not lie where the damages were unliquidated, and the contract afforded no rule for ascertaining them.

These views conduct us to the conclusion, that an attachment will lie in such a case as the present. Let the judgment be reversed, and the cause remanded.

FREEMAN v. McBROOM, ET AL.

1. *Semble*: A bill may be dismissed at the hearing for *want of equity*, although no demurrer is interposed, and the answer does not question its equity.
2. M. a resident of Madison county recovered a judgment against F. in the county court of Jackson county, to enjoin which F. filed his bill in the chancery court of Madison—making M. and four other persons defendants; two of these latter reside without this State, and the other two in Franklin and Talladega counties; all the defendants but the one who resided in Talladega answered the bill, without objecting that it was filed in an improper county; the defendant living in Talladega was in default in not answering within due time, and a rule was pending against him to show

cause why he should not be attached: *He'd*, that in this predicament of the cause, the bill should not be dismissed on the ground that it should have been filed in the county where the judgment was rendered; that an objection to the locality of the suit was in the nature of a plea in abatement, and was waived by the answers, if it could have availed had it been previously made; and the defendant who was in contempt could not submit such a motion.

Writ of Error to the Court of Chancery at Huntsville.

THE plaintiff, a resident of Jackson county, filed his bill setting forth, that the defendant, McBroom, as the assignee of his co-defendant, Wilder, recovered a verdict and judgment against him in the county court of that county, on a bill single for one hundred and twenty-five dollars. It is alledged that the writing on which the judgment was rendered, with three others of the like amount each, and of the same date, were executed to Wilder, and the defendant, Swann, in order to obtain the title to a tract of land, situated in Jackson county, which the complainant had previously purchased of the defendant, Moore. The consideration of the specialties the complainant avers has wholly failed, that he has made full payment to Moore, and the latter to his vendor; but the legal title to the land is still in the defendant, Wilder, and his sister, Mrs. Swan and her husband.

It is alledged that McBroom resides in Madison county, Wilder in Franklin county, Moore in Talladega county, and Swan and wife in the State of Tennessee. The bill prays that Moore may produce the bond for title executed by his vendor, that Swan and wife, and Wilder, may produce the several specialties described in the bill, and that they be cancelled; *Further*, that McBroom and all others may be enjoined from proceeding on the judgment in his favor; that the premises described in the bill may be conveyed to, or vest in the complainant; and that such other and further relief as may be just and equitable be granted.

The chancellor dismissed the bill without prejudice, at the complainant's costs, upon the ground that the court in which it was filed could not exercise jurisdiction in the cause.

S. PARSONS, for the plaintiff in error, insisted, that the res-

idence of McBroom in Madison, distinguished this case from Shrader v. Walker, et al. 8 Ala. Rep. 244. The principle on which courts of equity act in restraining the prosecution of judicial proceedings in other courts, is to act on the person proceeding, and not on the court in which he is an actor. It is then immaterial in what court a judgment sought to be enjoined was rendered, if the party to be restrained is amenable to the jurisdiction. In fact it has been supposed that an injunction lies to restrain a judgment in a foreign court. [Drewy on Inj. 96-7.] The court in which the defendants bill was filed is one of general chancery jurisdiction, and the defendants having answered without objection, cannot afterwards call upon the court to repudiate the cause, upon a ground which does not affect the merits, but operates as an abatement of the suit. [6 Paige's Rep. 77.]

J. ROBINSON, for the defendants. The case cited from 8 Ala. R. 244, is directly in point, and fully sustains the decree of the court of chancery.

COLLIER, C. J.—It has been repeatedly held, not only by this, but by other courts, that a bill may be dismissed at the hearing for want of equity, although no demurrer is interposed and the answer does not question its equity. In the present case it is true, the chancellor in his decree states that the cause was submitted on a motion to dismiss for want of equity, but he does not address himself to the consideration of the bill in that aspect; but determines, that although the bill may contain abundant equity if it were filed in the chancery court of Jackson, yet the court in which the suit was pending could not entertain it.

All the defendants except Moore had answered without insisting that the bill was filed in an improper chancery district; but for any thing appearing to the contrary, were willing to submit to the jurisdiction. And at the term when the decree was rendered, but previous thereto, an order was made, reciting that Moore had been served with a *subpœna*, more than thirty days and requiring him to show cause why an attachment should not issue against him. In this condi-

tion of the cause we cannot think the court should have repudiated it. The objection at most is only in abatement of the suit, without denying to the complainant a right to the redress which he seeks—it applies to the locality of the jurisdiction whose powers are invoked, and not to the case itself, as one to which chancery should lend its aid. If the defendants had expressly consented that the court in which the bill was filed, should proceed in the cause to a final decree, this would have estopped them from objecting, either in the primary court or on error, to the jurisdiction, because of the residence of the parties, or the court in which the judgment complained of was rendered. May not such an assent be implied from the failure of the defendants to insist that the suit was instituted in a chancery district which had no jurisdiction over the defendants, or the judgment? [See 1 Bail. Eq. R. 187; 1 Dev. & Bat. Eq. R. 3, 182; 5 Hump. R. 315; Holman, et al. v. The Bank of Norfolk at this term.]

It has frequently been held in suits at law, that when the court has no jurisdiction of the subject matter in dispute, such want of jurisdiction cannot be waived by appearance, plea, consent, or in any other manner, and a judgment rendered in such case in favor of the plaintiff will be void. Yet where the court has jurisdiction of the subject matter, but not of the person, such want of jurisdiction of the person may be waived by consent, or by plea to the merits, and cannot be afterwards asserted. [1 Humph. R. 332.] In the present case, it must be intended that the motion to dismiss was made by the defendants who had answered the bill—in fact, Moore being in contempt, he could not move in the cause. Their assent that it should be heard in Madison must be implied from the omission to object to jurisdiction either in their answers or previously.

Shrader v. Walker, et al., is unlike the present case. There the judgment enjoined was rendered, and all the defendants but one, who was an *immaterial party*, resided without the chancery district in which the bill was filed. The motion to dismiss was made before an answer was filed; and it is there intimated that the defendants might have yielded to the jurisdiction, but as their consent had not been in any manner given, we sustained the decree dismissing the bill. We

need not consider whether the residence of McBroom, (the plaintiff in the judgment,) in Madison, further distinguishes these cases, as it sufficiently appears from what has been said that the bill was improperly dismissed. The decree is consequently reversed and the cause remanded.

ROBINSON, ET AL. V. ROBINSON.

1. It is no ground for the interference of a court of chancery, that slaves administered upon in the State of Tennessee, are brought to this State, by the widow of the deceased, under a claim of title, with the consent of the administrator, unless the Orphans' Court should refuse the temporary letters of administration which the statute authorizes to be granted in such a case.

Writ of Error to the Chancery Court of Perry.

THE bill filed by the plaintiffs in error, charges, that Samuel Robinson, late of Shelby county, Tennessee, died, leaving a widow, Mary Robinson, who was his second wife, and by whom he had no children. That complainants are his children, and heirs by a former marriage. That their father died seized and possessed of a large amount of property, real and personal, and among the rest, of certain slaves, which are described. That one John Wherry administered on the estate, which was almost wholly free from debt, and is now entirely solvent. That the widow, setting up an exclusive claim to the slaves mentioned in the bill, has with the connivance and consent of the administrator, taken possession of the slaves aforesaid, and clandestinely brought them to this State, with the aid of one James Wherry, and now has them concealed in Perry county in this State, for the purpose of defrauding complainants. That these slaves belonged to

their father at his death, and are subject to distribution. That the administrator and his sureties are almost worthless, and not able to respond to complainants for the loss of the slaves, &c. The prayer of the bill is for distribution according to law, for a *ne exeat*, &c. Mary Robinson, the widow, and James Wherry, are defendants to the bill. An attachment in the nature of a *ne exeat* was awarded, and bond and security given by the complainants according to the *fiat* of the circuit judge.

The answer of Mary Robinson admits the material allegations of the bill, but denies that the administrator administered on these slaves, to which she sets up a title under the will of her father, executed in South Carolina, on the 2d May, 1824. That she was married to the deceased in 1832, and that they lived together until 1842. The slaves in controversy are the slaves, and the descendants of the female, left to her by her father. She renounces all claim to the residue of the estate. The defendants demurred to the bill, and assign as causes of demurrer—

1. The object of the bill is double, in seeking relief against the administrator, and also against respondent in her private right.

2. That the bill contains no prayer for relief which the court could grant.

The chancellor considered, that there was ample relief at law, and dismissed the bill, from which decree this writ is prosecuted.

A. GRAHAM, of Perry, for plaintiff in error, contended that the bill was maintainable, because, as the administrator had not taken possession of the slaves, nor claimed them as assets, the heirs could not sue him, and that as he had colluded with the widow, and permitted the property to be brought to this State, where it was concealed, a court of equity could alone grant relief. [Calhoun v. King, 5 Ala. 523; 1 Stew. 536; Hendrix v. Robinson, 7 Dana, 165; Thomas v. White, 3 Littell, 177; Isaac v. Humphreys, 1 Vesey, 430; Marr v. Southwick, 2 Porter, 370.]

Letters of administration vest title in the administrator to

the property, in the State, at the time of the death, but not to that which is brought in afterwards, and such is the express provision of the statute of this State. [Jewett v. Smith, 12 Mass. 309; Story on Con. of L. § 516; Embry v. Miller, 1 Mar. 303; Henderson v. Clark, 4 Litt. 277.]

Chancery has concurrent jurisdiction with the orphans' court. [5 Ala. *supra*; Mitford, 126; Leavens v. Butler, 8 Porter, 380; Williamson v. Branch Bank, 7 Ala. 906; Blakey v. Blakey, 9 Ala. 391; Harrison v. Harrison, Ib. 477; Treadwell v. Rainey, Ib. 590.]

In any event, chancery will retain the cause, if the circumstances require it, until an administrator can be appointed, if one is necessary.

A. B. MOORE and I. W. GARROTT, *contra*.

If the administrator has acted, as charged in the bill, he is liable on his bond for a *devastavit*, and should have been proceeded against in Tennessee. [Cook's R. 200; Wright v. Wright, 2 McCord, 199.]

The bill is filed prematurely, as the distributees are not entitled to distribution by the laws of Tennessee, until after the lapse of two years.

The chancery court has no power to appoint an administrator, as that is vested exclusively in the orphans' court, [Clay's Dig. 301, § 22,] and the only bill which could have been filed, is a bill *quia timet*, to prevent the destruction of the property pending the litigation. [Harrison v. Harrison, 9 Ala. 479.]

The orphans' court has power to grant letters of administration in such cases as this, but it will be ancillary to the administration in Tennessee. [Clay's Dig. 303, § 33; 222, § 10; Story C. of L. § 518; Treadwell v. Rainey, 9 Ala. 590; Orcut v. Orms, 3 Paige, 459; Baines, adm'r, v. Bra-shears, 2 B. Mon. 384; Fenwick v. Lewis, 1 Cranch, 259.]

This suit cannot be maintained, being instituted before grant of letters of administration in this State. The letters granted in Tennessee can have no effect here. [Jenkins v. Fryer, 4 Paige, 47; Wooden v. Bagley, 14 Wend. 453; Bradford v. Felder, 2 McCord, 168; Story Con. of L. § 514; Logan v. Fairlie, 2 Con. Eng. Ch. 459; Riley v. Riley, 3 Day's

Cases, 74; *Brumley v. Duke*, 1 Rand. 108; *Buff's adm'r v. Price*, C. & N. 68; *Jackson v. Jeffries*, 1 Marsh. 88; *Thompson v. Wilson*, 2 N. H. 291; *Fenwick v. Lewis*, 1 Cranch, 258; *Campbell v. Toucey*, 7 Cow. 34.]

ORMOND, J.—The jurisdiction of the court of chancery, to make distribution of the slaves in controversy, is attempted to be maintained, because the slaves never came to the possession of the administrator in Tennessee, but that he has colluded with the widow of the deceased, and permitted her to bring the slaves in controversy to this State, although they are assets of his intestate. That suit cannot be brought in the name of the administrator, as they never came to his possession, and that no administration can be granted here, because the slaves were not in this State, at the time of the death of the intestate.

The foreign administrator certainly cannot sue in this State for the recovery of these slaves, in virtue of his letters granted in Tennessee, unless he proceeds according to the statute, and records his letters in this State; and as he is required to execute a bond, and deposit it in the proper orphans' court, before he receives the effects, it is in effect an ancillary administration. [Clay's Dig. 227.] The same act provided for the appointment by the orphans' court, of an administrator in this State, in such a case; that is, where the intestate had no known place of residence in any county of this State, administration may be granted in any county, where the goods and chattels, and debtors, or any part thereof, of such testator or intestate may be. [Clay's Dig. 303, 33.] It is therefore very clear, that such a case as this, is expressly provided for by the statutes cited. The doctrine contended for, that the orphans' court has no jurisdiction unless the property was in this State at the time of the death of the intestate, is not warranted either by the terms of our acts previously cited, or by the object to be effected by the law, as the necessity for a representative of the estate, would be the same, whether the property was here at the death of

the intestate, or was sent, or as in this case, brought here afterwards.

In *Logan v. Fairlie*, 2 Sim. & Stu. 282, the vice chancellor held, that where an executor in India sent money to England to discharge legacies there, a suit could not be maintained in chancery for the legacy, unless administration had been taken out in England, and the administrator made a party to the suit. In that case, it is to be observed, there was no specific appropriation by the executor of the money to the payment of the legacies: the money was therefore held to be assets of the estate, about which no decree could be made, until an administrator was appointed. See also cases on brief of the defendant in error.

In this, as in other instances of general rules, there may be possible exceptions, and such appears to be the case where the executor colludes with a debtor of the estate, there a creditor may be allowed in equity to proceed against the assets in the hands of the debtor. And in England, it seems the insolvency of the executor, and his refusal or inability to act, might also be a sufficient reason for permitting the creditor to sue. [*Alsager v. Rowly*, 6 Ves. 748; *Burroughs v. Elton*, 11 Id. 29.] But in these cases, it is to be observed, there was a legal representative of the estate, who was either unable or refused to act, and if the creditor had not been permitted to proceed against the assets, he would have been without remedy.

The case of *McDowel v. Charles*, 6 Johns. Ch. 132, is an instance, where a bill was permitted to be filed, where there was no legal representative. There, there were but two persons entitled to representation, and the one in possession of the fund, procured the husband of the other to be removed from the administration, and if she could not sue in equity, she was without remedy, as there were no creditors to take out letters of administration. This case only proves, that the rule must yield to the stern necessity of the case, where it is necessary to prevent a failure of justice. No such necessity exists here, as the plaintiffs will themselves be entitled to administer if the widow refuses.

The courts of chancery of this State have no power to grant letters of administration; that is conferred on, and be-

longs exclusively to the orphans' court. [Clay's Dig. 301, § 22.] The concurrent power of the chancery court, to take jurisdiction with the orphans' court of the settlement of estates does not attach until a representative of the estate is appointed by the orphans' court. Until that is done, no question concerning the estate can be litigated, as there is no one representing the property of the deceased.

The distinction between this case and that of *King v. Calhoun*, 5 Ala. 523, is, that there administration had been granted in Georgia, and the administrator having brought the assets to this State, and they being about to be sold for the payment of his debts, after his decease, chancery interposed to prevent the destruction of the fund, until the estate could be settled, and the amount in the hands of the administrator for distribution ascertained. [See also, *Treadwell v. Rainey*, 9 Ala. 590.]

From these considerations, it appears, that no decree can be made in a case circumstanced like the present. We thought at first, however, that the bill might be considered as a bill *quia timet*, and retained to enable the complainants to take out letters of administration, there being strong grounds to apprehend from the previous conduct of the parties, that the slaves would be removed from the state, pending the application for letters from the orphans' court, and we so announced our judgment. Since then, and during this court, the same question has again come under consideration in the case of *Watson v. Bothwell*, and further reflection has satisfied us, that there is no ground for the jurisdiction of chancery, to entertain the bill for any purpose.

A statute of the state, not brought to our notice in the argument of this cause, fully provides for the exigency of such a case as the present, and renders a resort to chancery unnecessary. The act declares, that "during any contest about the validity of a will, the infancy, or absence of the executor, or administrator, and in such other cases not otherwise provided for," a temporary administrator may be appointed, with such limited authority as the case may require, and when necessary, "such administration may be granted forthwith, without any citation." [Clay's Dig. 222, § 10.] Un-

der this statute it is difficult to conceive of a case in which the orphans' court, could not give as full redress, as a court of chancery. The temporary administrator being invested with the legal title, could by suit at law obtain the possession of the property, or require those holding it to give security for its production. It will be observed, that the act dispenses with citation in urgent cases, so that the remedy afforded is more prompt than an appeal to the chancellor for an injunction, and in the possible event that the judge of the orphans' court should refuse to act, chancery might interpose and afford the necessary relief.

This bill is wholly wanting in any such allegation ; no application was made to the orphans' court, and none appears to have been contemplated ; the bill is therefore wanting in equity, and should be dismissed.

Decree heretofore entered, set aside, and bill dismissed without prejudice.

ANDERSON v. BROOKS.

1. Where, upon the trial of the right of property under the statute, it appears that in a suit in chancery between the same parties, certain slaves were adjudged to be liable to satisfy the plaintiff's judgment, the decree will be conclusive between the parties in respect to the subject matter in all other courts ; but if the question of liability to the judgment was not litigated by the pleading, the decree will not conclude the controversy upon it, although the register may have reported he sold the slaves under the decree, and the chancellor confirmed his report.
2. The rigid application of the principle, that the continuance of the vendor of personal property in possession after an absolute sale, is *prima facie* evidence of fraud, will not be enforced where a person other than the creditor purchases goods under a *fiери facias*, and permits the defendant therein to retain the possession for a short time, and for a purpose consistent with fair dealing.

3. Where the purchaser of slaves at a sale under a *fieri facias* permits them to remain in the possession of the defendant in execution for a short time, that the wife of the latter may have the benefit of their services, and while thus situated settles them *in trust* for the *separate use of the wife and her children*, such possession by the husband will not make the purchase under the *fi. fa.* fraudulent, so as to subject the slaves to an execution against the husband's estate which was levied after the settlement was executed.
4. A deed conveyed real and personal property to a trustee as a provision for the support and maintenance of the mother (a married woman) and the support and education of her children—declaring that the trustee shall hold and possess the same, *in trust for the sole use, benefit and behoof of the mother and her children, and shall not sell or charge it*: Held, that the deed invested the wife and her children with the beneficial estate, and that the husband had no interest in virtue of his marital rights, which could be subjected to the payment of his debts.

Writ of Error to the Circuit Court of Macon.

THIS was a proceeding under the statute, for the trial of the right of property. On the 15th November, 1842, a writ of *fieri facias* was issued from the circuit court of Macon, on a judgment previously recovered by the plaintiff against Peter C. Harris, which was levied on sundry slaves by the sheriff of that county, and which, on the 2d January, 1843, he returned superseded by an injunction. An *alias fi. fa.* was issued on the 9th May, 1844, and levied on the 24th July, of the same year, on sundry slaves, to which the defendant in error interposed a claim, and entered into bond for the trial of the right of property. The cause thus made was tried by a jury, a verdict returned for the claimant, and judgment thereon rendered. From a bill of exceptions sealed at the instance of the plaintiff in execution, it appears that the claimant gave in evidence the record of a chancery suit lately pending in Macon, wherein the claimant and one Stocks were complainants and the plaintiff and Harris were defendants, the answer of plaintiff, a cross bill filed by the plaintiff against claimant, Harris and Stocks, the answer of the claimant, the proof taken on the cross bill, the decrees of the chancellor, reports of the register, and their confirmation by the chancellor. The plaintiff objected to the admission of this

record, but the court permitted the same to be read, reserving the right to rule thereafter in regard to its effect.

The court charged the jury—1. If the negroes in controversy were not embraced in the chancery proceeding, then the chancery record had nothing to do with this case, and the report of the register of the slaves which had been sold by the sheriff, and its subsequent confirmation by the chancellor, was not such an adjudication of the title to these slaves, as would prevent the plaintiff in execution from controverting the plaintiff's title to them. This charge was given under the impression that the action of the register in respect to the slaves sold by the sheriff, was voluntary and unauthorized. 2. If they should find the slaves in controversy, or any of them, to have been embraced in the chancery suit, and sold under the decree rendered therein, and that such sale was confirmed by the chancellor; then the plaintiff being a defendant in the original suit, and complainant in the cross bill was estopped from insisting upon any circumstances of fraud, either in the making of the mortgage, or in the management of the property, before the sale by the register. To this extent, and none other, the jury would regard the record from the court of chancery. The plaintiff excepted to this charge.

The plaintiff's counsel prayed the court to charge the jury, that the proceedings in chancery furnished within themselves no bar to the plaintiff's right of recovery in this action, and that the decree which had been given in evidence, ought not to be considered by them. This charge was given, and in connection therewith the court repeated the second instruction stated above. The plaintiff excepted to the charge as qualified.

Previous to the levy of the plaintiff's execution on the slaves in question, they had been sold, some of them under an execution, and others under the decree in chancery already referred to. At these sales, the claimant and N. H. Clanton were the purchasers, and the slaves were sold as the property of Peter C. Harris. By a deed executed by the claimant and Clanton previous to the levy in the present case, they conveyed the slaves now sought to be condemned to the satisfaction of the plaintiff's execution, to the claimant for the

benefit of Mrs. Narcissa A. Harris, the wife of the Harris mentioned above, and her children, &c. Proof was given as to the possession of the slaves after the purchases of the claimant, and Clanton, and before they executed the deed for the benefit of Mrs. Harris, which it is insisted showed that there was no change of possession.

Upon this branch of the case, the plaintiff prayed the court to charge the jury—1. If, since the sale of the sheriff under execution, the slaves returned to the possession of Harris, or were in his possession at the time the execution in the present case was levied, and Harris is insolvent, then the slaves in that condition must be found liable; unless the continued possession is explained. It was not a sufficient explanation to repel the imputation of unfairness, to prove that the slaves were left for the purpose of waiting on Mrs. Harris. This charge was given with the following explanation, viz: if they found the sales to the claimant and Clanton were fair, then the possession of P. C. Harris will be construed to be the possession of his wife, the beneficiary in the deed executed by the two former. To this charge as qualified, the plaintiff excepted.

2. That the deed executed by the claimant and Clanton to the former, for the benefit of Mrs. Harris and her children, shows such an interest in her husband in the property thereby conveyed, as makes it liable to the satisfaction of the plaintiff's execution. This charge was refused, and the plaintiff again excepted.

J. E. BELSER and N. HARRIS, for the plaintiff in error, made the following points: 1. The chancery record was not admissible evidence; but if it was, the first charge should have been given without qualification, and the qualification annexed lays down the law incorrectly. [8 Ala. Rep. 707; 9 Id. 162, 704; Scales v. Scales, at the present term.] The same objection applies to the ruling in respect to the second charge. [5 Ala. Rep. 531; 7 Ala. Rep. 270.] Prosser v. Henderson, at this term, does not show that the second prayer should have been overruled, or the qualification was correct. The deed under which the claim is attempted to be supported does not exclude the marital rights of Peter C.

Harris, the defendant in execution. [1 Yeates' Rep. 427; 2 Dev. & Bat. Law Rep. 135; 3 Hump. Rep. 631; 1 Verm. Rep. 252; 2 Ired. Rep. 238; 6 Sergt. & R. Rep. 466; 2 Dev. Rep. 432; 1 Mad. Rep. 199; 1 Dess. Rep. 491; 4 Dev. R. 286; 8 Ala. R. 151, 351.]

W. P. CHILTON and McLESTER, for the defendant in error. The chancery record, in which was litigated and decided the *bona fides* of the deeds of trust from Peter C. Harris to the claimant and Stocks, and to the claimant and Clanton, in which the slaves in question were embraced, was clearly competent evidence between the parties to that litigation. The charge in respect to the effect of the decree was quite as favorable to the plaintiff as he could ask. It permitted him to show fraud in the sale by the register, (if it existed,) although the register's report had been confirmed. In this we think an error was committed in favor of the plaintiff, as the report, after confirmation, was not collaterally impeachable.

The court also committed an error in favor of the plaintiff, in instructing the jury, that the decree only affected the title to such of the slaves in controversy as had been sold under its authority; and this although the cross bill of the plaintiff not only put in issue the *bona fides* of the trust deed, but required an account of all the property conveyed by them. The litigation in chancery drew in question not only the disposition of the property by the trustees in the respective deeds, but also by the sheriff under liens which overreached these deeds. We repeat then, that in permitting the plaintiff to go behind the confirmed report, an error was committed in his favor, of which he cannot complain.

If the sale to the claimant and Clanton was fair, it was clearly competent for them to permit the slaves to remain on the plantation where they were when they purchased, to wait on Mrs. Harris; and the ruling on this point was clearly correct.

The deed from the claimant and Clanton, for the benefit of Mrs. Harris and her children, did not invest Peter C. Har-

ris with any interest which was the subject of execution. It gave to the wife a separate estate.

COLLIER, C. J.—We can conceive of no objection to the admission of the record of the cause in chancery under the instructions which were given to the jury as to its effect. The court, it seems to us, limited its influence quite as much as the plaintiff could have required, when it charged the jury, that although he was a defendant in one bill and a complainant in the cross suit, yet if the liability of the slaves in question to the plaintiff's judgment was not litigated by the pleadings, he was not concluded; although the register reported he had sold them under the decree, and the chancellor confirmed the report. If the liability of the identical property had been controverted in chancery and adjudged against the plaintiff, surely a decree there rendered upon a question which arose in judgment, should be definitive of the rights of the parties in all courts, in respect to the same matter. The circuit court thus laid down the law, and decided nothing more in regard to the proceedings in equity.

We have repeatedly held in conformity to the principle of *Kidd v. Rawlinson*, 2 Bos. & P. Rep. 59, that, where a person not being the creditor purchases goods under a *fieri facias*, and permits the defendant therein to retain the possession for a short time, or for a purpose consistent with fair dealing, the purchase shall not be adjudged fraudulent, and the property subject to the debts of the party remaining in possession. The *notoriety* and publicity of such sales distinguish them from ordinary transactions between buyer and seller, and prevent the rigid application of the principle that the continuance of the vendor in possession after an absolute sale, is *prima facie* evidence of fraud. [See 2 Stark. Ev. 617-619, and cases cited in notes.] If the possession of the defendant in execution should continue for an unreasonable length of time, perhaps the inference might be indulged, either that the purchase was made with the defendant's money, or that the purchaser was reimbursed the money he advanced.

In the present case, the slaves returned to the possession of the defendant in execution after they were purchased by the claimant and Clanton; and after remaining there a short

time subject to their control, were settled upon the claimant, in trust for Mrs. Harris, the wife of the defendant in execution, and her children, &c. before the plaintiff's *fi. fa.* was levied. A possession under such circumstances did not prejudice the right of the purchasers under the execution and decree, and consequently cannot impair the title which the claimant has interposed as a trustee. If it were necessary to show an excuse for permitting it, in order to repel the imputation of fraud, we should think it would be enough to prove that the possession was left unchanged because the purchasers intended Mrs. Harris to have the benefit of the services of the slaves. The court then ruled correctly in deciding that upon this branch of the case, the important inquiry was, whether the claimant and Clanton were *bona fide* purchasers at the sale, under the execution and decree.

The deed under which the defendant in error has interposed a claim as the trustee of Mrs. Harris and her children, declares that it is the purpose of the donors to secure to the *cestuis que trust* the slaves in question, with other property, as a provision for the support and maintenance of the mother, and the support and education of her children. It is provided that the trustee shall hold the property conveyed, real and personal, in trust to effect that object; and that he shall only hold and possess the same in trust "for the sole use, benefit and behoof of the said Narcissa A. and her children; and these presents are made upon this further condition, that the said Hooks, trustee as aforesaid, shall not sell or dispose of said property, or any part thereof; but the intention of this trust is, that the said property is to be held by said Hooks, trustee as aforesaid, and managed by him so as to afford a fund out of the property arising therefrom, for the maintenance and education of the said Narcissa A. and her children; but the object is not to empower said Hooks, trustee as aforesaid, to sell and charge said property." This deed is certainly much more verbose than is necessary to express the meaning of the donors, but it explicitly declares that the gift is for the *sole use, benefit and behoof* of Mrs. H. and her children; and this declaration, so far from being weakened by what precedes or follows, is really strengthened. The authorities all show that the terms employed invest the wife

and her children with the beneficial estate, independent of the marital rights of her husband; and that the latter has no interest which can be subjected to the payment of his debts. They are furnished by our own reports, and we need not stop to cite them. The judgment of the circuit court is consequently affirmed.

JULIAN AND WIFE v. REYNOLDS, ET AL.

1. The allegations of a bill, being, that an administratrix in South-Carolina, had purchased a number of the slaves of the estate, with the assets of the estate, and converted them to her own use, bringing them to this state, and afterwards conveying them by deed of gift to two of her children, and praying an account of them, as assets of the estate, &c., and the proof being, that by the purchase, the administratrix bought only what she considered her own interest, and that of two of her minor children in the estate—that she paid no money, but executed her own note to her co administrator for the amount—Held, that the proof did not sustain the allegations of the bill—Further, that there was nothing, shown upon the bill, to give a court of chancery of this state, jurisdiction.

Error to the Chancery Court of Lowndes.

THE bill was filed by the defendants in error, and alleges that James Mosely died in South Carolina, possessed of a large estate in land, slaves, &c., and that Mary Mosely, the widow, and John Mosely, one of the distributees, became his administrators. That by the law of South Carolina, the widow is only entitled to an estate for life in the portion assigned her, and that the complainants are each entitled to one tenth part, and that John Mosely, has waived his distributive share. That the administrators sold personal property to the amount of \$7,756 58, and that other effects to a large amount came to their hands. That at the sale of the estate, Mary Mosely purchased a number of slaves, (whose

names are given,) with the effects of the estate, and which it is alledged, together with their increase, belong to the distributees. That she has in her possession other slaves, (also described,) exchanged for some of those purchased at the sale, or purchased with money belonging to the estate, and it is insisted that she is only a trustee, holding for the benefit of the distributees. It is also alledged that John Mosely purchased slaves at the sale more than equal to his distributive share.

The bill also alleges the sale of sundry tracts of land, &c., and the purchase by Mrs. Mosely of a tract of land in Lowndes county, with the assets of the estate, &c. and that Mary and John Mosely, have never accounted, or settled said estate. That she now claims the slaves as her own, and has by deed of gift dated 25th September, 1830, conveyed them to Eliza Julian, formerly Eliza Mosely, and to Martha Mosely, and all the personal property in her possession.

Mary and John Mosely and others are made defendants to the bill. The prayer of the bill is for an account, an injunction, &c., and that the deed of gift be cancelled.

Mary Mosely answered the bill, but as Julian and wife, and the guardian of Martha, answer and put in issue the allegations of the bill, upon which the equity rests, it is unimportant to state it.

By order of the chancellor, the deposition of John Mosely, a defendant in the suit was taken, subject to all legal objections, an affidavit being made of his materiality, and that no decree was sought against him in that suit.

His testimony establishes, that the sale of the estate took place in the spring of the year 1828; that at the sale he purchased a boy at \$500; that his mother purchased a number of slaves at the sale, intending to buy the interest of herself and the four minor children, and executed her note to him for the amount. The name of the slaves, and the price given for each, are stated. That she paid no money at the sale. No settlement has ever been made of the administration.

The chancellor overruled the objection to the testimony of John Mosely, one of the defendants, and considering that his testimony substantially sustained the allegations of the

bill, ordered an account to be taken. This is now assigned as error.

JOHN D. F. WILLIAMS, for plaintiffs in error.

1. The bill and proofs do not correspond, and the bill should have been dismissed. [Gibson v. Carson, 3 Ala. Rep. 421; Clements v. Kellog, 1 Ib. 330.]

2. Mary Mosely did not purchase with the trust funds.

3. An administrator with an interest may purchase at his own sale, provided the sale and purchase be *bona fide*.— [Brannon v. Oliver, 2 Stew. 47; Julian v. Reynolds, 8 Ala. 680.]

4. Even where there was no order of sale in South Carolina, unless the laws of that State do not require it. [Brannon v. Oliver, 2 Stew. 47.]

5. There was no bad faith in the purchase merely because she did not give security. After the term of credit, she was chargeable with the amount of her note as cash. [Childress v. Childress, 3 Ala. 852.] *

6. There was no bad faith, unless she violated the terms of the sale, and this does not appear.

7. The bill does not charge fraud, nor are the facts inconsistent with good faith. And a court of chancery will not therefore impute fraud. [Steele & Kinkle v. Lehr, 3 Ala. 352.]

8. John Mosely was an incompetent witness—1. Because he is a party defendant, and liable for cost. 2. Because a decree is prayed against him. 3. Because an order *pro confesso* has been taken against him. 4. Because it is greatly to his interest to subject the specific property in controversy. [1 Smith's Ch. Pr. 344.] 5. Being a co-administrator, he is liable for Mary Mosely's acts under the laws of South Carolina. [Lucus v. Curry, 2 Baily, 406; Burt v. Kimble, 5 Por. 137.]

HOPKINS and BOLLING, contra. The law of this case was settled when it was here at a previous term. [8 Ala. 680; see also, 7 Ala. 906.]

The effect of the allegation in the bill, that Mrs. Mosely purchased the slaves with the assets of the estate, is equiva-

lent to an allegation that she paid nothing for them, as she paid nothig for them which belonged to her, and the estate received nothing in exchange. [Taylor v. Branch, 1 S. & P. 249; Stewart v. Eden, 2 Caine's, 126; Saunderson v. Judge, 2 H. 13; Harrison v. Weaver, 2 Porter, 542; Gressly Eq. Ev. 167.

Each administrator is liable to the distributees for the assets only, which he received. [Edmunds v. Crenshaw, 14 Peters, 166; King v. Shackelford, 6 Ala. 426; Bondercan v. Montgomery, 4 W. C. C. R. 186; 10 Peters, 175, 582.] It does not appear that John Mosely ever had any of the slaves in his possession, or is liable for the receipt of them by the administratrix, and no decree is sought against him. He was then a competent witness. [Greenl. Ev. 90, 446; Thompson v. Armstrong, 5 Ala. 383.] Doby was then also a competent witness.

John Mosely having with his mother executed a joint bond for the administration, is at most only responsible as her surety, and although a defendant to the bill, as no decree was sought against him, he was competent to testify against his own interest, and in favor of the complainant, if he does so without objection. [2 Brock. C. C. Rep. 159.] A purchase by an administrator at his own sale, without giving security for the purchase money is void. [McLane v. Spence, 6 Ala. 897.]

Mr. Mosely being a trustee, the plaintiffs in error are mere volunteers, being dohees, and the trust fund may be followed in their hands. [Levin on Trusts, 616; Levan v. Ligon, 1 McCord, 232.]

ORMOND, J.—The rule is the same in a court of chancery, as at law, that to entitle a party to relief, the allegations and proof must correspond, and that relief can no more be granted on proof without the necessary allegations putting such facts in issue, than upon allegations without proof. Clements v. Kellogg, 1 Ala. 330, and in previous, as well as subsequent cases, the same doctrine has been stated and enforced.

The relief is sought in this bill, upon the allegation, that Mary Mosely, one of the administrators of the estate purchas-

ed a number of the slaves of the estate, with the assets of the estate, and has converted them to her own use, and conveyed them by deed of gift to two of her children. The proof is, that she purchased them at the sale, designing at the time to purchase only the amount of the distributive shares, of herself, and the four minor children in the estate; that she made no payment whatever on account of her purchase, but executed her note for the amount of the purchase money to her co-administrator.

It is very obvious that the case made by the bill, and the facts as disclosed by the proof, are entirely dissimilar. The bill is filed on the assumption that the slaves are still the property of the estate—that as trust property they may be followed into the hands of a purchaser with notice, or of a mere volunteer, as the donees here are alledged to be, and that the distributees may demand an account of it, as property belonging to the estate. The proof shows that the slaves are not the property of the estate, but the individual property of Mrs. Mosely, and that she is a debtor to the estate to the amount of her purchase, if she has not discharged it by the payment of debts due by the estate, or in satisfying the claims of the distributees. There is nothing in the proof from which it can be inferred, that the purchase was not made in good faith, and is not such as would be supported; even if the purpose of the bill was to set it aside. There is not, according to repeated decisions of this court, any objection to such a purchase by a personal representative, such as Mrs. Mosely was, with an interest, if made *bona fide*, and we cannot assume that the law on this subject, is different in South Carolina, from our own, as was held in this case at a former term.—[Julian v. Reynolds, 8 Ala. 683.]

It would then, be a sufficient reason for repudiating this bill, that it is wholly unsupported by proofs of its allegations, but it is open to another objection quite as formidable. The bill discloses a case of equitable cognizance every where, where the trust property might be found, and it might be added, exclusively cognizable in equity. But the proof shows, that the courts of this state could not take jurisdiction of this subject, but that the probate court of South Carolina, is the

appropriate forum in which the estate should be settled. In *King v. Calhoun*, 5 Ala. 523, a bill in chancery was sustained, where administration had been commenced upon an estate in Georgia, and the property of the estate, in specie, alleged to be brought into this state, and in imminent danger of being wasted, as the administrator was dead, and the property about to be sold for the payment of his individual debts. We held that chancery might interpose to prevent the destruction of the fund, and having possession of the case for one purpose, might retain it for all purposes, make a final settlement of the administrator's account, and decree distribution.

The fund here in the hands of Mrs. Mosely, is the amount she will be found indebted to the estate, upon the settlement of her administration in South Carolina, and after receiving a credit for the sums she may have paid to the several distributees. If this fund being in this state, were in danger of being lost, possibly a court of chancery might interfere. But that fund, whatever it may be, is not only not ascertained, it does not appear to be in any danger. An attempt was made, by an amendment to the bill, to show that the slaves supposed to be trust property, were in danger of being removed from this state, but the chancellor very properly refused an injunction, considering the causes alleged insufficient. It may be added, that it appears that the sureties to the administration bond, are amply sufficient to ensure the collection of the fund, which may yet remain in the hands of the administratrix, if it were shown that she is not herself able to respond. [*Treadwell v. Rainey*, 9 Ala. 593; *Story on Conf. of L.* 432, § 16, and cases there cited.]

These considerations, as they are decisive of the case, render it improper to enter upon the enquiry, whether J. Mosely, a defendant to the bill, the witness by whom the complainant established the facts, was competent, under the circumstances, to testify.

The bill must be dismissed, but without prejudice to any suit the complainants may hereafter institute to recover their distributive shares, of their father's estate.

GAMBLE v. GAMBLE'S ADM'R.

1. A deed by which the husband in general terms gives slaves to his wife, in consideration of love and affection, does not divest the estate of the husband in a court of law, and a possession of the slaves acquired by the wife after the death of the husband, as his personal representative, does not invest her with an interest which will inure to her administrator, so as to enable him successfully to defend an action of detinue brought by the administrator *de bonis non* of the husband, for the recovery of the slaves. Such a deed is merely void at law, and can only be made effectual in equity.
2. It cannot be assumed as a legal conclusion, because a wife, who is the personal representative of her husband, produces a deed by which the latter purports to give to her certain slaves, without further proof of the delivery of the deed or slaves, that, therefore the possession of the deed was parted with by the husband for her benefit. The fact of the delivery should be referred to the jury for their determination.
3. The possession of personal property which one acquires as an administrator, cannot be united to and perfect an equitable title which he claims in his individual capacity, so as to defeat an action by the party having the legal estate.
4. A verbal admission by a party that personal property in his possession belonged to the plaintiff, does not estop the defendant from showing that the admission was made by mistake, or that it is untrue; especially, where the plaintiff was not misled by it, or it did not induce him to institute his action.
5. The indorsement on a deed of gift of personal property, that it was *acknowledged and recorded*, purporting to be made by the clerk of a court of another State, is not such evidence of the fact of registration, as the courts of this State will recognize. To authorize the admission of such evidence, the deed should be authenticated as the act of Congress requires; and it should also appear, that the law of the sister State required or authorized the registration of such a deed.
6. Where one acquires the possession of property as an administrator, and an action of detinue is brought against him for its recovery without noticing his representative character upon the record, it cannot be assumed that he is a wrong-doer, so to prevent him from defending upon the title of his intestate.
7. Where a contract by which personal property was sold and conveyed by husband and wife is rescinded, in the absence of all proof to the contrary, the parties will be considered as placed *in statu quo*.

Writ of Error to the Circuit Court of Sumter.

THIS was an action of detinue at the suit of the defendant in error, for the recovery of a female slave named Clara, and other property. The cause was tried by a jury, who returned a verdict in favor of the plaintiff below in respect to the slave, assessed her value at \$500, and damages for her detention at \$192, and judgment was rendered accordingly. On the trial, the defendant excepted to the ruling of the court. It appears from the bill of exceptions, that the intestate of the plaintiff was the wife of Walter Gamble, who was the father of the defendant by a former marriage—there being no issue of the intestate by Walter. The defendant and his father both repeatedly declared that the slave Clara, and her mother Becky were the property of the intestate.

The plaintiff introduced a deed, which purported to have been executed by Walter on the — day of May, 1828, which recited that he was then a citizen of Orange county, in the State of Virginia, and in consideration of natural love and affection, gave to the intestate (his wife) the slaves Becky and Clara. At the foot of this deed there was a certificate subscribed by an individual as clerk, stating that the donor, at a quarterly court held for Orange county, on the 28th of May, 1828, acknowledged the same; that it was ordered to be recorded, and was recorded in book GG, p. 304. It was also proved by a witness, that he believed the signature of the donor to be genuine; but he was not present at its execution, knows nothing of its delivery, or of the delivery of the possession of the slaves therein named.

Becky and Clara were the property of the intestate previous to her marriage with Walter, and the latter was heard to say after his removal to Alabama, that they were his wife's, he having only a life estate in them.

Previous to the institution of this suit, defendant said to a member of the bar residing in Sumter, that the plaintiff and himself had settled the controversy in respect to the slaves, but being afterwards advised that as the administrator of his father he could not yield up the possession, the settlement had been vacated, the paper which evidenced it, destroyed;

and that the plaintiff would now take the slaves from his possession by suit. Defendant at the same time added, that they were the property of the intestate.

The defendant then adduced a bill of sale made by Walter and intestate for Becky and Clara to Benjamin Walker, of Orange county, Virginia, on the 28th February, 1837—a bond of the same date, by which they undertook to pay to Walker the sum of \$50 for the hire of these slaves for the remainder of that year, and return them at the end thereof. He also offered a deed purporting to be made in the same county and State, by Benjamin Walker, on the 9th January, 1842, by which he released and quitted claim to Becky and Clara to the defendant and Thomas Gamble. The execution of all these papers was proved, and admitted as evidence.

The deposition of Benjamin Walker was then given in evidence, in which the witness states that he understood that Becky and Clara were acquired by Walter on his marriage with the intestate; he purchased them as indicated by the bill of sale, but afterwards, at the request of his vendors, sold them back at the price he gave, and returned their bill of sale. After the death of Walter, witness was applied to by the defendant for a release of his title, whom he informed that he did not consider he had any claim to the slaves; but at the solicitation of the defendant, gave the quit claim deed above referred to.

Walter, upon his marriage with the intestate, took possession of these slaves, which continued without interruption until his death, except as above—after that event, the intestate took and retained possession until his death; and after intestate's death, defendant took possession, which he still retains. Walter had no other slaves than Becky and Clara until 1828.

Walter made a will, by which he gave to the intestate all his estate for life, then to be divided between his two sons. The intestate administered upon her husband's estate *cum testamento annexo*; after her death the defendant became administrator *de bonis non*. The plaintiff is the administrator of the intestate.

Upon these facts the court charged the jury substantially as follows, viz: The deed of 1828, from Walter Gamble to

his wife, passed nothing in law, because of their unity in legal contemplation; but the gift was just such an one as a court of chancery would sustain; that the donor was probably guided by those influences which would naturally induce a man to desire to give to his wife property which he received by her. This was most probably his motive, as he had no child by the donee, but was the father of children by a previous marriage.

In the opinion of the court, the plaintiff had two sufficient legal grounds for his recovery. Upon the death of Walter, his widow (the intestate) qualified as his administrator with the will annexed, and thus became invested with a legal title and right of property in the slave in question—the equitable estate which she previously had, attached to this legal title and made it complete, and on her death it was transmitted to her personal representative.

A court of chancery would have restrained Walter from selling the slaves to Walker, yet, conceding that the latter acquired a legal title by his purchase, the re-sale placed the donor and donee in the same situation in which they stood previous to the sale to him, as it respects the slaves embraced by the deed of May, 1828.

The local law of Virginia must govern, the construction and effect of the deed from Walter to his wife, and by that law the deed was good between the parties, whether it was recorded or not.

The defendant prayed the court to charge the jury as follows:

1. That the law furnishes the rule to guide them in the construction of the deed of May, 1828; by that law it passed no estate whatever, and is not good even between the parties.

2. The bill of sale from Walter Gamble and wife to Benjamin Walker, if fair and *bona fide*, operated to pass whatever title they had to the slaves embraced by it, and thus divested them of all title thereto.

3. The re-sale of the slaves by Walker, whether made to Walter alone, or to his wife, or to both jointly, vested the property absolutely in Walter Gamble; unless it is shown

that by the re-sale it was restricted to the sole and separate use of his wife.

4. The jury must disregard the deed from Walter to his wife, dated in May, 1828, unless it appears from the proof to have been delivered to the latter, or some one for her; or that the slaves were delivered to her, or some one for her.

5. If the intestate, Mrs. Gamble, took possession of the slaves under her husband's will as his property, and in the character of administratrix with the will annexed, she was bound to discharge the debts of the testator, and if she died before a final settlement of the estate, and the defendant was appointed administrator *de bonis non*, then the defendant was entitled in his representative character to retain the slave in question, until a final settlement of his administration accounts. This instruction was refused, on the ground that it was abstract, and the preceding instructions prayed were denied without remark.

S. W. INGE, for the plaintiff in error made the following points: 1. The deed of May, 1828, was a voluntary deed, and void by the laws of Virginia between the parties, unless it is duly recorded. [2 Rand. Rep. 384; 4 Id. 219; 6 Rand. Rep. 135, 541, 764; 1 Ala. Rep. 56; 2 Id. 648.] It is a nullity *at law*, and what a court of chancery would do, was an inquiry which could not have been made on the trial before the jury. [Clancy's Rights, &c. 1; 2 Kent's Com. 129; 2 Story's Eq. 601; 7 Johns. Ch. Rep. 60; 3 How. R. (Miss.) 324.] But if it were permissible to inquire how chancery would regard such a paper, it is insisted that it would not be supported in that tribunal. [Fonb. Eq. 101, note; Clancy's Rights, 260, 393; 1 Dev. & Bat. Rep. 57, 65; 7 Johns. Ch. Rep. 60; 5 Port. Rep. 137; 9 Id. 649; 1 Ala. Rep. 52; 2 Id. 117, 648, 684; 4 Id. 158.]

2. The bill of sale of February, 1837, by Walter and wife to Walker, if fair and *bona fide*, passed whatever title they had to the latter; and the re-sale by Walker vested an exclusive estate in the husband. [4 Port. Rep. 208; 8 Id. 72; 6 Ala. Rep. 418, 463; 3 Johns. Ch. Rep. 88.]

3. As the administrator *de bonis non* of his father, the defendant was entitled to the possession of the slaves, [4 Ala.

Rep. 524;] and the jury should not have been instructed that the plaintiff had the absolute right to recover. [2 Ala. Rep. 310.]

4. The tenor of the charge to the jury was calculated unduly to influence their verdict in favor of the plaintiff. [1 Ala. Rep. 423; 2 Id. 359, 524.]

5. A party's admissions, under a misapprehension of his legal rights, cannot affect his interest. [4 Wend. Rep. 292; 7 Ala. Rep. 185.]

R. H. SMITH, for the defendant in error. There was no proof of a registry law of Virginia, and it could not therefore be assumed that the law of that State required such a deed as that of May, 1828, to be recorded; but if there was proof to the point, the deed would be good between the parties. [4 Ala. Rep. 164; 5 Id. 36.] Whether it was intended to evidence a *gift*, or make a *settlement*, it is alike operative. [Toller's Ex'rs, 226; Wms. Ex'rs, 484, and notes; Clancy's Rights, &c. 259; 2 Story's Eq. 602-3-7-8; 1 Atk. R. 270; 3 Dess. Rep. 155; 2 Johns. Ch. Rep. 537; 7 Id. 61-4; 6 Ala. Rep. 599, 600, 609.]

The delivery of the deed was sufficient. [1 Johns. Ch. R. 240, 251 to 255, 329; 2 Verm. Rep. 473; 3 Dev. Rep. 129.] It is competent to look to the admissions made by the husband and the defendant his son to sustain it, and determine the donor's meaning. [1 Dev. & Bat. Rep. 55; 4 Ala. Rep. 521.]

By the appointment of the wife as executor, and her qualification as such, the legal title attached to the equity she already had; thus executing the donor's intention. [1 Johns. Ch. Rep. 337; 6 Ves. Rep. 662.] But independent of this, the death of the husband removed the wife's disability to hold property, and by operation of law, her estate became legal. [3 Dess. Rep. 155; 7 Johns. Ch. Rep. 61-64; 6 Ala. Rep. 599] The defendant cannot resist a recovery, as he induced the plaintiff to sue. [2 Leigh's N. P. 782; 14 Eng. C. L. Rep. 242.]

Again: the defendant is a mere wrong-doer, and cannot gainsay the plaintiff's right to recover, although the latter shows no other than an equitable title. The sale in which

the wife joined, to Walker was void, as her husband received the purchase money; [Clancy's Rights, &c. 23, 54, 68; 8 Cow. Rep. 277;] but if it was valid, the rescission of the sale reinvested her with her prior rights; especially does this appear from the admissions of the father and his son.

The defendant cannot defend as administrator, nor insist upon a title held in that character. [3 Stew. Rep. 221; 5 Ala. Rep. 36; 1 Lomax's Ex'rs, 79; Com. Dig. tit. Adm'r, C. (3); 7 Johns. Rep. 161; Rob. on Fraud. Conv. 593-4.]

COLLIER, C. J.—By a principle of the common law, the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union. From this principle it results, that at law no contracts can be made between husband and wife, without the intervention of trustees. [2 Kent's Com. 129.] “The principles of the common law apply to pronounce them a mere nullity.” Yet courts of equity, though they follow the law, will, under particular circumstances give effect and validity to *post nuptial* contracts. [2 Story's Eq. § 1372.] “In respect to gifts or grants of property by a husband to his wife, after marriage, they are ordinarily, (but not universally,) void at law. But courts of equity will uphold them in many cases, where they would be held void at law; though in other cases the rule of law will be recognized and enforced.” [2 Story's Equity, § 1374.] It was formerly supposed, that in all such arrangements the interposition of trustees was indispensable to the protection of the wife; but it is now well established that courts of equity will protect the wife's interest against the marital rights of the husband, although no trustees are interposed. [Id. § 1380; Hoot v. Sorrell, et al. at this term; see also, my opinion in Frisbie v. McCarty, 1 Stew. & P. Rep. 56.]

In Sheppard v. Sheppard 7 Johnson's Chancery Reports, 60, it was said that a deed from a man to his wife “was undoubtedly void in law, for the husband cannot make a grant or conveyance directly to his wife during coverture,” and courts of equity have frequently refused to lend assistance

to such a deed, or to any agreement between them; though it must be conceded that there are many cases in which such conveyances have been upheld. And it has been held, that a deed of gift of negroes from the husband to the wife, without the intervention of a trustee, upon an agreement to live separate, will be no bar to an action at law, by the husband, for the recovery of the property. [3 How. Rep. (Miss.) 324.] In that case it appeared that the husband signed the articles of separation, and put his wife in possession of the slaves. The court said, the deed is an absolute gift to the wife, without qualification—it does not profess to give her a separate property; consequently an absolute right vested in the husband, and unless he divested himself of it, he must be entitled to recover. Again, the marriage was not dissolved by the agreement to live separate, and the gift by the husband cannot be made available at law, and was improperly admitted as evidence. “Such matters are peculiarly cognizable in equity and if the defendant has a remedy it is there, and not at law.” [See also, 1 Atk. Rep. 270; 3 Id. 679; Clancy on Rights, &c. 251.]

In the case cited from 7 Johns. Ch. Rep. *supra*, as well as in several cases there referred to by the chancellor, the husband was dead previous to the institution of the suit; such was also the fact in *Elms v. Hughes*, 3 Dess. Rep. 155; yet in none of them was it supposed that the death of the husband had any effect upon the conveyance which he made to his wife. The jurisdiction of equity was regarded as appropriate—in fact the only tribunal that could recognize and validate the act.

If a *post nuptial* gift *in presenti*, from a man to his wife directly, is merely void at law, and inures to his own benefit, it is difficult to perceive how the death of the husband can impart validity to it. The object of the gift in such case would be the husband's property at his death, and if the wife was to take possession of it under a claim of right, founded on the conveyance, though she might not become an executor *de son tort*, her claim would be disallowed. The act was invalid, as we have seen, in virtue of the law operating upon it, and the mere volition of the wife that it shall be effectual, manifested by exercising dominion over the

thing, cannot impart to it validity. Conceding to her the possession under a claim of right, and still she would have no title to which the possession could attach and perfect, of which a court of law would take notice. Deeds that are voidable only, are sometimes validated by something occurring after their execution, but those which are void *ab initio* cannot thus acquire vitality.

It is not competent for a court of law to inquire, whether a gift such as we are considering is sustained by a meritorious consideration, and is such as equity would uphold. That tribunal is incompetent to institute and pass upon such an inquiry, which can be solved by considerations of which a court of chancery is the appropriate arbiter, and of which it has exclusive jurisdiction. The wife's rights, if she have any, are dormant until they are established in equity—until then they are *in embryo*, and cannot be recognized at law. A court of equity may see in such a transaction, the elements of vitality, but until body, form and action are imparted to these, a court of law must treat it as inanimate and lifeless.

There may be cases in which possession will perfect a title which it would be necessary otherwise to assert in equity; but in these it is apprehended that a court of law would regard the title as good when coupled with the possession, and the only effect of the suit could be, to be let into its enjoyment. Such we have seen is not the character of the case before us. Here the intestate had no title until a court of equity should establish it. Each of these tribunals are charged with the jurisdiction of matters which pertain to the one in exclusion of the other, and it is well settled, that at law a defence purely equitable cannot be entertained.

In *Elliott v. Elliott*, 1 Dev. & Bat. Eq. Rep. 65, it was decided that the formal signing, sealing and having attested a deed by a husband to his wife, cannot be taken for a delivery, or as having been intended as such. "There must be proof of some further act; delivery in fact, or the production of the deed by the wife, with evidence at least of such acts on her part in relation to the property in his lifetime, as would induce the belief that she had the deed in his lifetime, and by his consent; this is the more necessary, as the intimate relation between the parties, and her means of access to

his papers, affords opportunities to possess herself of the instrument without his consent or knowledge. The ordinary presumptions therefore do not reach such a case." That was a case in equity, and it was added that the "court expects satisfactory and clear evidence that the deed was delivered, and that her husband meant to make thereby such a separate provision for her as the deed purports to create, that is, immediate, and to make himself her trustee; instead of being the beneficial owner." Further, "A wife must have merits to make the court active in her behalf. She is not like a purchaser for value. The aid of the court is discretionary under all the circumstances."

In *Frisbie and wife v. McCarty*, 1 Stew. & P. Rep. 56, the plaintiff relied upon a deed of gift made to the wife by her father, when she was unmarried, and but ten or twelve years of age. A question arose as to the necessity of a delivery of the deed, and it was decided, that so long as the donor retained possession, without ever having delivered it, either to the donee if capable of receiving it, or to some person for her use and benefit, or into the proper office to be recorded, the gift is imperfect and the deed is void. The delivery should be such as would deprive the donor of the power of revocation; for until then he reserves to himself the *locus penitentiæ*.

If the delivery of the deed in the case before us had been a pertinent and material inquiry, the court should not have assumed it as a conclusion of law, but should have referred its solution to the jury. The effect of the joint bill of sale by husband and wife to Walker—the declarations of the husband, and of the defendant since his death, that the slaves were the property of the wife, &c. in determining the question of delivery, were all proper matters for the consideration of the jury under the direction of the court.

If the character of the wife's possession was a question in issue, we think the fact she had administered with the will annexed, on her husband's estate, should have induced the court to charge the jury, that her possession as administrator could not be united to, and perfect an equitable title, which she claimed in her individual capacity. The possession of the property of a deceased person as executor or administra-

tor merely, cannot invest the possession with rights independent of, and disconnected with his trust estate. [12 Ves R. 497; 2 Dess. R. 101; 3 Id. 155.]

The admissions of the defendant that the slave sought to be recovered in this action was the property of the plaintiff's intestate, cannot estop him from showing that the reverse is true, or that he was mistaken. Such an admission is a matter *in pais*, and cannot operate as an estoppel. Nor can his admission that himself and the plaintiff had settled their controversy in respect to the slave in question, but ascertaining that he was not authorized to make such a settlement, they had vacated it, and the paper which evidenced it was destroyed, and the plaintiff would now take the slave from his possession by suit, cannot conclude the defendant from making defence. It may show what was the defendant's opinion at that time, as to the validity of the intestate's title, but does not preclude him from proving that he was mistaken; nor does it seem to us to dispense with all proof on the part of the plaintiff. The admissions do not seem to have misled the plaintiff or the intestate, or to have induced the prosecution of the present suit. There are cases where a party has been estopped by his admission from proving the contrary; thus where a person upon a demand of goods admitted that against him, he will be liable, although he had not a general lien on them, and thereby induces another to bring detinue controlling power over the thing. [3 Car. & P. Rep. 136.]

In respect to the registration of the deed of 1828, it may be enough to say that the indorsement of the clerk in Virginia, that it was acknowledged and recorded, is not such evidence of the fact as the courts of this State can notice. The act of Congress prescribes the mode in which such deeds shall be authenticated to entitle them to the dignity of evidence in the courts of the sister States, and it is perfectly clear that the deed as presented to the circuit court did not conform to the act. In addition it may be said, that it does not appear that there was any statute of Virginia which required or authorized the registration of such a deed, and in the absence of proof it cannot be presumed.

It cannot be assumed that the defendant is a wrongdoer, and cannot therefore controvert the plaintiff's claim. If the estate he represents has the superior title, he may assert it and defeat a recovery against him. The cases cited by the defendant in error are inapplicable, and do not prove the reverse to be the law in a case circumstanced as the present. But if the law were otherwise, the plaintiff would fail for the defect of his own title—or rather because he has not shown a *prima facie* legal title in his intestate.

We infer from the proof in the record, that the sale by the husband and wife to Walker, was merely rescinded ; and consequently the rights of all parties were placed in *statu quo*. What we have said will indicate our view of the laws in this case, without making a particular application of it to the questions raised upon the bill of exceptions. The result is, the judgment must be reversed, and the cause remanded.

ROBINSON & CALDWELL v. MAULDIN, MONTAGUE
& Co.

1. A growing crop of cotton may be conveyed by deed of trust.
2. A conveyance of "fifty thousand pounds of cotton, to be produced during the present year, upon the plantation of the party of the first part, in the county of Marengo, the said cotton to be the first cotton which may be gathered from the crop of cotton now planted and growing upon the said plantation, and to be neatly ginned and packed in good bales, ready for market," is a conveyance of 50,000 lbs. of ginned, or cleaned cotton. The terms "first cotton which may be gathered," means of the early, in contradistinction to the late gathering ; and therefore when ninety-one bales of the early gathering were ginned and baled, the *lien* attached, although there was then in its crude state, a quantity of cotton not separated from the seed, gathered earlier in the season, than that which composed the ninety-one bales.

3. When one professing to act as an attorney in making a deed, acknowledges that he signed it, &c. for the purpose of registration, his acknowledgement will be referred to the character in which he is acting.
4. When a trustee in a deed of trust, refuses to make the affidavit, and take the steps necessary to a trial of the right of property, the *cestui que trus* may resort to a court of chancery to have the trust enforced.
5. An authority to execute a deed of trust, gives the power by implication to acknowledge it for registration.
6. The omission to state in the probate of a deed, made by an attorney in fact, that it was *delivered*, is not essential, it having been in fact delivered by him and registered.

Error to the Chancery Court of Marengo.

THE bill was filed by the defendants in error, and alleges that Josiah Du Bose, of South Carolina, engaged in the business of planting, in Marengo county, was indebted to them in the sum of \$3,366.22, due on the 1st January, 1843, by promissory note, indorsed by one James H. Du Bose, and dated the 26th April, 1842; that on the day of the date of the note, Isaiah Du Bose, by James H. Du Bose, his attorney in fact, to secure the payment thereof, executed a deed of trust to John J. Lomax as trustee, by which he conveyed fifty thousand pounds, of the first picking of the crop of 1842, then growing on his plantation, to be neatly ginned, and packed, in bales ready for market, and upon the failure of said Du Bose to pay the note at maturity, the trustee was authorized to take said 50,000 pounds of cotton, and ship the same to complainants at Mobile, to be there sold for the payment of the note, unless the said Du Bose should pay the same, or ship his cotton to them for the same purpose.

That Du Bose had gathered, and ginned 50,000 lbs. of the cotton of the first picking, of 1842, and had packed the same, in about 112 bales, of which 91 bales, or thereabout, of the identical cotton conveyed in trust, were remaining on the plantation for the purpose of being shipped to them at Mobile, and sold to satisfy the trust, when they were seized and taken by the sheriff of Marengo, upon a writ of execution in favor of Chas. Maywood, against Isaiah Du Bose, for a large sum of money,

which was issued subsequent to the making, and recording of the trust deed.

That the 50,000 lbs. of cotton, is insufficient to discharge the note ; that Isaiah Du Bose is insolvent, and James H. Du Bose merely an accommodation indorser ; yet the sheriff knowing these facts, and combining with Robinson and Caldwell, who are partners of Charles Maywood, persist in threatening to sell said cotton, &c. That Lomax, the trustee appointed in said deed, refuses to become a party to a suit at law for the trial of the right to said cotton, or to interfere effectually in any other manner at law, as such trustee, to secure the benefit intended to be secured by the conveyance.

Prayer for an injunction, &c.

The power of attorney proved, and recorded, and the deed of trust also recorded, are made exhibits to the bill. The probate of the latter, indorsed on the deed, is as follows :

State of Alabama—Marengo county.

Personally appeared before me, Thomas J. Woolf, clerk of the county court of said county, James H. Du Bose, attorney in fact for Isaiah Du Bose, and acknowledged that he signed, sealed, and, the foregoing deed on the day of the date thereof, to the therein named John S. Lomax, and the said John S. Lomax, and R. V. Montague, at the same time acknowledged before me, that they signed and sealed the same, at the same time, for the purposes therein expressed. Signed and attested by the clerk, the 26th April, 1842.

The defendants, by their answer, admit the levy, &c. Deny all knowledge of the consideration of the note, to secure which the deed was made, or of the deed, and require proof—that the deed was made to defeat their claim, founded on a judgment obtained in South Carolina, upon which suit was then pending. Insist that the deed of trust did not convey the cotton, but was a mere agreement for a sale of the cotton when gathered, &c.

Upon application, an order was made for the examination of Lomax, and W. H. Du Bose, as witnesses.

Much testimony was taken, fer which, so far as it is important, see the opinion of the court.

The cause coming on to be heard, the chancellor overruled the objections to the testimony of the witnesses, Gaudy and Lomax, and considering that the deed contained a transfer of the cotton, and was not a mere agreement for a sale in future, decreed in favor of the complainants.

These matters are now assigned as error.

BROOKS, for plaintiff in error.

MANNING, contra.

ORMOND, J.—The principal question in the cause, whether a growing crop of cotton, can be the subject of such a conveyance as this, appears to be fully established in the cases of *Ravisies v. Alston*, 5 Ala. 297, and *Adams v. Turner & Horton*, Ib. 470, where it is explicitly declared, that a growing crop has such an existence, as may be the subject matter of a sale, mortgage, or other contract, to vest in possession, either immediately or at some future time. This doctrine is well supported, both by reason and authority.

In *Curtis v. Auber*, 1 Jac. & W. 510, an assignment of the present, and future earnings of a ship was sustained by Lord Eldon. So an assignment of freight earned, or to be earned by four ships, was held to be good by the vice chancellor, in *Douglass v. Russell*, 4 Sim. 524, and affirmed on appeal to the Lord Chancellor. In the recent case of *Langton v. Horton*, 1 Hare, 549, which was a deed of assignment by way of mortgage, of a whale ship, her tackle, &c.; and all oil, and head matter, and other cargo, which might be caught, and brought home in the ship, on, and from her then present voyage. In this, as in most of the preceding cases, the question arose, as in this case, between an execution creditor of the assignor, and the assignee, as to the future cargo, or earnings of the vessel, after the assignment, and the vice chancellor held, the conveyance to be good. He said, "it was impossible to doubt, for some purposes at least, that by a contract, an interest in a thing not in existence at the time of the contract, may, in equity, become the property of a purchaser for value."

In *Mitchell v. Winslow*, 6 Law Rep. 8 No. 350, Judge Story reviewed all the leading decisions upon this subject,

and held, that a mortgage upon machinery, tools, and stock in trade, was valid, and protected the mortgage in a court of equity, against the assignee of the mortgagor in bankruptcy, although in conformity with the stipulations of the deed, a portion of the machinery, tools, &c. was put into the factory after the execution of the mortgage.

Chancellor Kent in his commentaries, 3 vol. 5 ed. 488, note, speaking upon this subject, says, "It is sufficient, that the thing contracted for has a potential existence, and a single hope, or expectation of means, founded on a right in *esse*, may be the object of a sale—as the next cast of a fisherman's net, or fruit, or animals not yet in existence."

The facts of this case bring it within the limits of most of those cited. It was not the sale of an article to be obtained, or produced in future, as the product of something then in existence, but it was the sale of the crop then growing. It had an actual, and not a mere potential existence, and by the operation of the laws of nature, would certainly be perfect in the course of the season. It is considered by Lord Eldon, in the case of *Curtis v. Auber*, *supra*, a settled principle, that wool growing on the backs of sheep may be assigned, and that even an assignment of the future fleeces would be good in equity; and certainly there can be no rational distinction between wool growing on the backs of sheep, and cotton maturing in the field. See also, *Robinson v. Macdonnel*, 5 M. & S. 228.

It is also urged, that this conveyance is void for uncertainty—that although the conveyance of an entire growing crop might be supported, this cannot, because it attempts to convey an unknown, unascertained, and uncertain portion of it. The conveyance is of "fifty thousand pounds of cotton, to be produced during the present year, upon the plantation of the party of the first part, in the county of Marengo, the said cotton to be the first cotton which may be gathered from the crop of cotton now planted, and growing upon the said plantation, and to be neatly ginned, and packed in good bales, ready for market."

If the conveyance of the entire growing crop would be supported, we are unable to perceive why an ascertained quantity and portion of the crop, would not fall within the same

rule. The first fifty thousand pounds which shall be picked out, ginned and baled, is as certain, and conveys to the mind as distinct and precise an idea of the thing conveyed, as if it had been the entire crop. The cases referred to, of sales of property where something remained to be done by the vendor, before the article was to be delivered, or where the thing sold was part of a large mass, which was to be separated from it, and before which it was impossible to know what particular portion belonged to the vendee, have no application here, because the portion conveyed was in fact separated from the general mass before the levy of the execution; and if not previously, certainly when the fifty thousand pounds of cotton were picked, ginned and baled, that was such a separation from the general mass as would vest the property in the vendee, within the principle of the cases of *Harrison v. Meyer*, 6 East, 614; *Austin v. Craven*, 4 Taunton, 644, and *White v. Wilks*, 5 Id. 176.

We shall briefly consider the other questions, in the order in which they are made. It is true, that where an execution is levied on property secured by a mortgage or deed of trust, as a complete remedy exists at law, by the trial of the right of property, a resort cannot be had to a court of equity. But in this case, it is expressly alledged that the trustee refuses to take the necessary steps to have a trial of the right, and this allegation not being controverted, or put in issue by the answer, must be considered as admitted. This takes the case out of the rule laid down in *Marriott & Hardisty v. Givens*, 8 Ala. 706. The *cestui que trust* has no means of compelling the trustee to make the affidavit, and execute the bond which the statute requires as preliminary to a trial of the right of property, and if he refuses to do so, the beneficiary may resort to a court of chancery for protection.

The objection cannot be made in this court, that there is no proof that Lane had parted with his interest to the complainants, as the fact was not denied or put in issue by the defendants. In *Hubbard v. Moore*, 4 Ala. 192, the plaintiff's title was directly controverted, and upon that ground, it was held to be necessary he should prove that his co-partners had transferred their interest to him. That was a case in which

one partner, assuming to represent several, sued the remaining co-partners for a settlement of the partnership accounts, his right to sue alone was therefore a question in which the defendants had a direct interest. Here the objection is purely formal, as the defendants have no interest whatever in the question, and as it does not appear that the objection was made in the court below, where doubtless the necessary proof would have been made, it cannot be raised here.

There was no error in refusing to suppress the deposition of Gaudy, because it did not answer fully the cross interrogatory, as the question which he omitted to answer was wholly immaterial, and if answered, could have had no influence upon the case.

The supposed ambiguity in the deed does not belong to that class which admits of explanation by parol proof; but in our opinion the alledged ambiguity does not exist. We consider the terms, "fifty thousand pounds of cotton," to mean that quantity of baled cotton. This is shown by the context, the object and purpose of the deed, and the debt it was intended to secure. Besides, conceding it to be susceptible of two meanings, that construction should be put upon it, most favorable to the grantee, especially where that construction accords with the professed object of the parties, the security of the debt, whilst the other would in a great measure defeat it.

The remaining questions, arise out of the registration of the deed, and the authority of the agent. The probate is alledged to be insufficient, because it omits the word "delivered." In *Hobson v. Kissam & Co.* 8 Ala. 360, the constituents of the probate of such a deed as this, were considered by us at length, and we there held that the omission in the certificate of probate to state that the deed was executed on the day of its date, did not prevent its registration under the act of 1828. That decision is fully in point in this case, for certainly the omission to state in the probate that the deed was delivered, could not be material, when the fact that it was registered upon the acknowledgment of the grantor, necessarily includes a delivery of the deed.

It is further urged, that the agent had no authority to make an acknowledgment of the execution of the deed, for

the purpose of registration. The power under which he acted, authorized him "to draw promissory notes, bills of exchange, and writings obligatory under seal, to enter into contracts for, and make sale of any kind of property, either real or personal, and to do and perform all manner of business, as to him should seem expedient" for the management of the affairs of his principal. We think it perfectly clear, he had the power expressly conferred on him, to execute such a deed as this, and that necessarily carries with it the authority to do every thing necessary to make the deed effectual. As he had the power to execute a deed of trust to secure a debt his principal owed, he had also the power to do all other acts essential to the execution of the power, though not expressly; and in terms conferred by the grant. Having power to execute the deed, he had also the power to acknowledge its execution, for the purpose of registration.

It also supposed that the deed was acknowledged by the attorney in his individual capacity, and not as agent, and that it is therefore insufficient. Its language is "personally appeared before me, &c. James H. Dubose, attorney in fact for Isaiah Dubose, and acknowledged, that he signed, sealed, &c. the foregoing deed on the day of the date thereof, to the therein named John T. Lomax," &c. The reasonable construction to be put upon this language is, that he acknowledged the deed on behalf of, and as the agent of his principal, as otherwise there is no motive for the recital of the fact, that he appears as the attorney of another person. But when the acknowledgment is considered in connection with the deed to which it refers, all doubt is removed, as it relates to a deed which was executed by him as the attorney in fact of Isaiah Dubose. No particular form of words is necessary to manifest the intent. It is sufficient if it can be gathered that the intention was to act as an attorney, and not in his individual capacity.

This disposes of the entire case, and ascertains that the chancellor did not err in the decree rendered; it is therefore affirmed.

The cause was re-argued on petition of the plaintiff in error.

BROOKS, for plaintiff in error.

MANNING, contra.

[Opinion of the court upon the re-argument.]

ORMOND, J.—We retain the opinion first expressed, that the terms “fifty thousand pounds of cotton,” mean ginned cotton, and not cotton as it is gathered from the plant, and from which the seed has not been separated. No other construction can reasonably be put upon the language employed, whether it be considered in reference to the object the parties had in view, or the thing contracted for. In common parlance, when one speaks of cotton, unless the contrary is expressed, or necessarily to be inferred from the context, or subject matter, the pure commodity, separated from the seed, is understood. Thus, if one was speaking of the quantity of cotton a hand could pick or gather in a day, he would be understood to mean cotton from which the seed had not been separated. But if he was speaking of the price of cotton, or offering to sell cotton at a stipulated price, he would be understood to refer to pure cotton, from which the seed had been separated, unless the context showed he meant otherwise. This was in effect a sale, as it was in fact, an appropriation of so many pounds of cotton to the payment of a debt, and unless the contrary were expressed, or necessarily to be inferred from the context, the language must be understood in its natural and ordinary acceptation. The fact, that the plaintiffs in error were not parties to this contract, can make no difference in the rule of construction which must be applied to it. They claim under the maker of the deed, and are bound by all the inferences and presumptions which would affect him.

The other question is one of more difficulty. In the outset, a conveyance is made of “fifty thousand pounds of cotton, to be produced during the present year, on the plantation of the party of the first part.” If it had stopped here, it would clearly have been a *lien* created on the entire crop, but the deed proceeds to state, “said cotton to be the first cotton which may be gathered from the crop of cotton now planted and growing,” upon the said plantation, and to be

neatly ginned and packed in good bales ready for market." Now, when was it the intention of the parties, the cotton should vest in the trustees? Did it vest in him as each lock of cotton was separated from the stalk on which it grew, or when it was collected in baskets for the purpose of being removed from the field; or when accumulated in larger masses in the cotton house? According to the argument urged, that the conveyance was of the first fifty thousand pounds gathered, and that when that quantity was gathered, it was separated from the general mass, and vested in the trustee, it would necessarily follow, that as each boll of cotton was gathered from the plant, (as the whole must be composed of the separate parts,) it became a part of the entire amount conveyed, and as such vested in the trustee.

We have already seen, that the conveyance was not seed cotton, but of fifty thousand pounds of pure, or ginned cotton, and until the cotton was separated from the seed, it was not the thing conveyed, something remaining to be done, by which to ascertain the quantity to which the trustee was entitled. Until this was done by ginning and baling it, the property in question did not pass to the trustee, though doubtless he had a *lien* upon the article in its crude state; and this inchoate right, a court of chancery would have protected, if an attempt had been made to divert the cotton from its proper destination. By the agreement of the parties, the cotton was to be ginned and picked, ready for market, and until this was done, the article was not placed in that condition in which it was to be placed, when the title of the trustee was to be complete; or, to speak with more precision, when the *lien* became perfect. As it was to be the first cotton gathered, which was to be ginned and baled for the security of the debt, upon a plantation of the size this is admitted to have been, this would happen early in the season, as in fact it did occur, early in November, if not sooner. But the debtor had until the first of January to pay the debt, and as until then there could be no default, the trustee had a *lien* merely, upon the cotton as ginned and baled, until that period arrived.

The contract must be interpreted by reference to the nature of the thing sold, in connection with the custom of the planter in ginning and securing his crop for market. It must have been known, that in the economy of the plantation, the processes of gathering, ginning, and baling the crop, were carried on together; the first two simultaneously, and the last at short intervals, as the clean cotton accumulated in the pick room. The parties then, could not have meant literally, that the first fifty thousand pounds gathered, should be the first ginned and baled, as the gathering and ginning would proceed together, and it would therefore be impossible to prevent the confusion of goods, which it is insisted has here taken place, by the intermixture of the cotton of the debtor with that designed for the payment of this debt. The terms, "first gathered," must be understood relatively, and not absolutely. It meant doubtless, that the cotton should be of the best quality, which would be that gathered early in the season, which is indicated by the language employed, and was merely intended to exclude the cotton last gathered, the importance of which will be seen, when we reflect, that the picking season would probably be over before there could be a default under the deed. It appears then to us, that the ninety-one bales here in dispute, being the first ginned and baled, sufficiently answer the description in the deed of the cotton conveyed, although there was then, in its crude state, a quantity of cotton gathered earlier than any included in these bales. It was notwithstanding cotton of *the first, or early picking*, which was doubtless the precise meaning of the parties. The arguments so strenuously urged, founded upon the supposed analogy between this case, and a conveyance of specific property, having an individual, separate existence, are not in point. The example put, of the first born of certain designated female slaves, would be a clear case, where the parties had individualized the property, intended to be conveyed, and when the children came into existence, the *lien* would attach, and could operate on no others.

But in addition, we think it does appear with reasonable certainty, that the ninety-one bales, with the exception of the unginned cotton, gathered previous to them, were of the

first gathering of the cotton. The overseer in his testimony says, that at the time of the levy, there were about fifty thousand pounds of cotton gathered, which had not been ginned, of which thirty-five or thirty-six thousand pounds were of the first hundred thousand pounds that were gathered. It is very certain then, that all the cotton gathered, had been ginned and baled, except the amount here stated, and that gathered previous, would make about twenty bales; and as he states that the first ninety-one bales ginned, are those claimed by the trustee, these, if added to the twenty bales not ginned, will only make about the quantity of cotton conveyed by the deed. So that in truth, the party is claiming the cotton which was first gathered, as well as first ginned and baled.

The obscurity in the testimony arises from the expression, that of the hundred thousand pounds first gathered, thirty-five or thirty-six thousand pounds remained yet to be ginned. But it is also clear, that the remainder of this hundred thousand pounds had been ginned and baled, so that the two parcels must have constituted all the cotton gathered at the time of the levy. The result of the examination is, that the judgment heretofore pronounced is correct.

DARGAN V. WARING, ET AL.

1. A judgment creditor may resort to a court of equity not only to subject the equitable interests of his debtor, but for the purpose of removing impediments to the sale at its value, of an estate which may be reached by a *fiери facius*.
2. A suit in equity by a creditor to set aside a fraudulent deed and have the land of his debtor sold, gives to the complainant a lien which will not be defeated by a *bona fide* sale by the defendant, or under an execution on a judgment which is not a superior and continuing lien against other judgment creditors who use greater diligence.

3. The neglect of the plaintiff in a judgment to sue out execution from term to term after the return of the original *fi. fa.*, will postpone his lien to a junior judgment creditor, who has instituted a suit in equity to subject the real estate of their debtor to the satisfaction of his judgment.

Appeal from the Court of Chancery at Mobile.

THE appellant filed his petition, stating that on the 28th December, 1840, Sylvester L. Fowler, Charles Fowler and Wm. Prout recovered a judgment in the circuit court of the United States for the southern district of Alabama, against John Ticknor, for the sum of \$4991, besides costs; and on the 31st of the same month and year, Thomas Crouch, Richard Crouch and Jesse Sneed recovered a judgment in the same court against the same defendant for the sum of \$7176 25, and costs. On both these judgments, executions were issued within one month after the rendition, and placed in the marshal's hands, who made due return thereof; afterwards, on the 1st of May, 1845, an execution was again issued and placed in the hands of the marshal of the district on the first named judgment, and on the 17th of the same month, one was issued and delivered to the marshal on the other judgment.

On the 7th July, 1845, certain real property situated in the city of Mobile, was regularly sold by the marshal of the district to satisfy these executions, of which the petitioner became the purchaser for the sum of \$7500, and received a deed therefor. This property is in the possession of Moses Waring, under the order of the court of chancery appointing him a receiver in the cause now pending in that court, in which Joseph Wiswall is complainant, and John Ticknor and James L. Day are defendants. Wiswall alleges in his bill that he is a creditor of John Ticknor, by a judgment rendered by the circuit court of Mobile in the spring of 1842, for \$2233 17, and costs, on which execution has issued and been returned, "no property found." This bill is framed for a discovery of assets of Ticknor, and to set aside a deed by Ticknor to Day, executed on the 28th April, 1840, upon the allegation that it is fraudulent as to creditors. A decree has been rendered, setting aside the deed and appointing Waring a receiver. Possession has been demanded of the

receiver and refused. Petitioner therefore prays that the receiver be withdrawn as to the premises in question, and that he be placed in possession thereof, and that such other relief as is proper be granted.

Wiswall answered, that at the time of the sale when petitioner purchased, he gave notice of the pendency of his suit and the proceedings therein. That he is informed and believes that the petitioner paid no money upon his purchase, but the property was purchased on behalf of the plaintiffs in the executions, and the amount credited on the judgments or one of them: *Further*, that the plaintiffs in the first named judgment, long previous to the petitioners' purchase, became bankrupts under the act of Congress of 1841, and that David A. Hall, of Baltimore or Washington, is their duly appointed assignee in bankruptcy; and on the 7th of March, 1845, respondent was served with the copy of a petition filed by Hall in the court of chancery at Mobile, which he has since been informed was withdrawn.

Respondent is informed that the judgment in favor of the Crouches and Sneed is founded upon a bill of exchange to which several mercantile firms besides those individuals were parties, that judgments were rendered thereon against all but one of the firms, but as to the individuals against whom judgments were rendered, no executions were ever issued: *Further*, that these plaintiffs have filed their bill in the circuit court of the United States for the southern district of Alabama, for relief against the deed executed by Ticknor to Day, and for satisfaction of their judgment.

Ticknor and Day merely answer that they are parties to the suit of Wiswall, and neither object nor assent to the prayer of the petitioner.

Waring answers that he was appointed receiver in the suit referred to, that he acquired possession of the property by attornment of the tenant, and that petitioner's purchase was made after notice had been given of these facts. The fact of notice was proved by the affidavit of K. B. Sewall.

The chancellor was of opinion that the property in question could not have been sold under execution until the deed from Ticknor to Day was set aside, and previous to this, the executions on which the petitioner relies to sustain his pur-

chase acquired no lien; that Wiswall acquired a lien by filing his bill, which was strengthened by the decree vacating the deed from Ticknor to Day, and appointing a receiver; that this decree placed the property in such a situation that it could not have been levied on; consequently the sale on which petitioner relies is a nullity. The petition was accordingly dismissed with costs. Thereupon the petitioner moved the court for leave to bring an action of ejectment against the receiver, which motion was denied; and from the decision dismissing the petition, and the refusal to permit the action to be brought, this appeal is prosecuted.

J. A. CAMPBELL, for the appellant, made the following points: 1. A court of chancery will interfere summarily in favor of third persons whose rights have been invaded under its order, or process. [Hoffm. Ch. Pr. 155; 2 Mad. Ch. 22; 2 Ball & B. Rep. 66; 1 Swanst. R. 457; 9 Paige's R. 372, 437; 7 Id. 65, 513; 10 Id. 43, 263.]

2. The executions under which the petitioner claims were levied before the order in chancery appointing a receiver; and the land consequently in the custody of the federal court when the court of chancery intervened. Equity will not interfere with the rights of judgment creditors who are pursuing their liens. [15 Eng. Cond. Ch. Rep. 715; 2 Story's Rep. 376.]

3. The conveyance from Ticknor to Day was void as to the creditors of the former, and the judgments in the federal courts operated a lien on the land in question. If the interests which the bill of Wiswall is seeking to condemn were merely equitable, then it might be conceded that a court of chancery should be resorted to, and his lien would be superior to the other judgment creditors; but as this is not the case, it cannot be admitted that the filing of the bill defeated the lien of the executions. [See 10 Johns. Rep. 517; 9 Paige's Rep. 372, 437; Meigs' Rep. 317; 1 Eq. Dig. §§ 339-40.]

4. Where judgments *create a lien*, equity follows the law, and yields priority to the oldest judgment in the distribution of assets. The question comes up in the effort to reach equitable interests under the section of the statute of frauds which

authorizes the sale of trust estates under the execution. In that condition they are deemed legal assets, and are administered in equity according to law. [See Ram. on Assets, 317; 2 Lomax's Dig. 119; 4 Paige's Rep. 42; 2 Hoff. Ch. Prac. 112.]

5. The jurisdiction by petition, and upon the matters stated in that filed in the present case, we think is maintainable. [3 Ala. Rep. 156.]

K. B. SEWALL, for the appellees, insisted that the petitioner's title dates from the execution of the marshall's deed, (1 Rich. Eq. Rep. 340,) and he could only acquire the estate which Ticknor then had. [7 Ala. Rep. 119.] At that time the land was in the possession of the court of chancery at the suit of Wiswall, of which the petitioner had actual notice; and was held under the order of the court for the benefit of the party ultimately entitled. [3 P. Wms. Rep. 379; 2 Story's Eq. § 833.] The possession then was adverse to Ticknor, so that there was no interest on which the executions from the federal court could operate a lien. [10 Paige's Rep. 43.]

The mortgage was forfeited, and the legal title in Day, (7 Ala. Rep. 440,) and Ticknor's title, if any, was a mere equity of redemption, not subject to levy and sale. [Bing. on Judgm. 99; 2 Atk. Rep. 292; 3 Id. 730; Coote on Mortg. 325, 330; 3 Bro. Ch. Cas. 478; 1 Murp. R. 333; 15 Pick. R. 83, 84; Caine's Cases, 47; 5 Ala. Rep. 584; 7 Id. 118; 1 Hill's N. Y. Rep. 108, 112.]

The deed to Day is merely voidable, and will be set aside as void at the instance of the creditor who impeaches it, but as to all others it stands good. [2 Edw. R. 123-4.] A judgment is only a general lien on the real estate of the defendant, (10 Cond. Eng. Ch. Rep. 502; 2 H. & Johns. Rep. 66; 1 Johns. Ch. R. 55-6,) and may be lost by negligence. [4 Ala. Rep. 543; 14 Eng. Cond. Ch. Rep. 417; P. Wms. R. 277; 2 Id. 491; 3 Murp. R. 43; 3 Swanst. R. 536.]

Wiswall acquired a specific lien by filing his bill, upon all the estate of Ticknor which could probably be reached by suit in equity, (2 Paige's Rep. 567; 20 Johns. Rep. 554; 5 Monr. Rep. 73; 9 Dana's Rep. 20; 1 Paige's Rep. 637; 10

Id. 598; 2 Scho. & Lef. Rep. 399,) and the creditor who first files his bill acquires priority as the reward of his diligence. But this preference in virtue of a statute in New York, extends only to equitable interests and personal property. [2 Hoff. Ch. Prac, 113-14; 2 Rev. Stat. of N. Y. 173, § 38, 39.]

The return of "no property found," is *prima facie* evidence of no legal estate in Ticknor, and the filing of Wiswall's bill gave the court jurisdiction, and placed the property under its control, and it will not be withdrawn so as to defeat the suit. [9 Dana Rep. 19, 20.] Having acquired jurisdiction, chancery will grant relief, although the title to the property be purely legal. [1 Story's Eq. § 64, 71; 4 Ala. Rep. 481; 7 Id. 945; 13 Pet. Rep. 151; 9 Wheat. R. 932.]

The executions under which the petitioner claims, were issued pending the suit of Wiswall, and can acquire no efficacy by relation to the executions previously issued—these had lost all their virtue by the return of "no property found," and chancery had exercised its control over the property at the suit of another creditor—had in fact adjudicated the question of its liability to Wiswall, and committed the property to the possession of a receiver. Under such circumstances it will not avail the petitioner that the judgments under which he claims exerted a prior lien; the court must examine for itself the nature of the adverse claim. [8 Paige's R. 389; 2 Story's Eq. § 801; 15 Eng. Cond. Ch. R. 749.]

The office of a petition is not to oppose or annul a decree. [1 Smith's Ch. Prac. 71; 13 Ves. Rep. 393.] If the petitioner is entitled to relief in equity, he must proceed regularly by bill.

To show when a creditor's bill may be filed, the counsel cited 3 Paige's R. 312; Rev. Stat. N. Y. 359, § 3; 360, § 12, 13; 363, § 1, 2, 3; 368, § 26.]

COLLIER, C. J.—A judgment creditor may resort to a court of equity not only to subject the equitable interests of his debtor, but for the purpose of removing impediments to the sale at its value of an estate which may be reached by a

feri facias. It has been held, that he may file his bill to set aside a fraudulent conveyance of land as soon as he has obtained a judgment which is a lien upon it, (*Mohawk Bank v. Atwater*, 2 Paige's R. 54;) and to entitle him thus to proceed it is not necessary that he should first sue out an execution. [3 Paige's Rep. 320. But see 1 Monr. Rep. 106, 231; 4 Id. 580; 1 Litt. Rep. 302; 2 McC. Ch. Rep. 410; 1 Paige's Rep. 305.] A suit in equity by a creditor to set aside a fraudulent deed, and have the land of his debtor sold, it has been decided, gives the complainant a lien on the land, which will not be defeated by a *bona fide* sale by the defendant, or under an execution on the judgment of another creditor. In such case, the purchaser under the execution *pendente lite*, will be overreached by the purchase under the decree, and the chancellor will compel him to surrender the possession. [5 Monr. Rep. 73; see 1 Dev. Eq. Rep. 537; 1 Hill's Ch. Rep. 297, 301; 9 Wend. Rep. 548; 6 Ohio R. 233.]

In the case at bar, Wiswall not only recovered a judgment against Ticknor, but he caused execution to be issued, which was returned "no property found;" the object of his bill was to vacate a conveyance (among other things) of land which Ticknor had made to Day, upon the ground that it was fraudulent. The jurisdiction of equity is well maintained by the authorities cited, and the most material question to be considered is, whether it can be divested by a subsequent levy and sale under a senior judgment. However this may be, where the lien of the judgment is paramount to that which attached by virtue of the suit in chancery, it is perfectly clear, that if the lien of the latter gave the superior right, the petitioner did not acquire a title by his purchase to which the possession can be yielded.

In *Newdigate v. Lee and Rees*, 9 Dana's Rep. 20, it was determined that the filing of a bill by a judgment creditor to subject the land of his debtor, or at least the service of process upon the bill, gives the complainant a lien on the property, by placing it under the control of the court, which will not suffer it to be withdrawn so as to defeat the object of the bill by any subsequent act or title. If the land is sold under an execution which came to the officer's hands, after

the bill had been filed, the purchaser must take it subject to the decree. So in *Sumner v. Kelly*, 2 Scho. & Lef. R. 398, it was decided, that when a decree has been obtained by a creditor on behalf of himself and other creditors, a prior creditor who has obtained a judgment a law in ejectment grounded on an *elegit* shall not be allowed to get into possession. *The Lord Chancellor* remarking that he could not suffer the proceedings in the court to be disturbed by letting any creditor get into possession.

The neglect of the plaintiffs under whose judgments the petitioner claims, to sue out executions from term to term, after the return of the originals, if it did not give to the execution in favor of Wiswall the superior lien, yet when connected with the filing of the bill, it had that effect. This, we think, results not only from the plain language of the statutes upon the subject of executions, but from the repeated judicial expositions they have received. [See 1 Stew. R. 72; 3 Id. 433; 2 Stew. & P. Rep. 390; 4 Id. 237; 5 Ala. Rep. 43; 4 Id. 93, 679; 7 Id. 632.] In respect to the lien of the judgments, it may be remarked that it has been decided, that a judgment gives to the creditor a lien on the real estate, not in virtue of any express statutory enactment, but as a consequence of the act of 1807, which gives the writ of *elegit* against the lands of which the debtor was seized at the time of obtaining the judgment. [3 Ala. Rep. 560; 2 Stew. 401.] At the common law a judgment did not operate a lien upon the real estate of the debtor; and the statute of Westminster, to which the right of lien owes its existence, does not in express words make the lands liable which the debtor had at the time of the judgment; but it is by implication and judicial construction, and by the election made by the plaintiff to sue out an *elegit* that a judgment is a lien upon the land. [3 Murph. Rep. 43.] But with us the act of 1812 preserves the lien, though the plaintiff causes a *fieri facias* to be issued. [Clay's Dig. 199, § 1; 205, § 17.]

In *Den ex dem. &c. v. Hill*, 1 Hayw. Rep. 72, it was said a judgment binds the lands from the time it is rendered, so as to take from the debtor the right of disposing of them; but if a *fieri facias* issues upon a subsequent judgment, and

comes to the hands of the sheriff, and the lands of the debtor are levied on and sold thereunder, the title passes to the vendee. Between creditor and creditor, it is not the first judgment; but the first execution that gives the preference. To the same effect is a *dictum* in Campbell v. Spence, 4 Ala. 543; see 1 Stew. 72.]

If Wiswall, insstead of proceeding in equity to set aside the conveyance from Ticknor for the benefit of Day, had caused a *fieri facias* to be issued, and the land in question to be sold, the purchaser would have acquired a title divested of the lien of the older judgments, and he, himself, would have been entitled to the purchase money. We have seen that the commencement of his suit in equity gave to his judgment a specific lien, which that court would not allow to be divested; that it was allowable for him to go into chancery and ask the removal of a fraudulent incumbrance, which would have prevented the land from yielding an equivalent at a sale under execution. Wiswall then, by the course he has pursued; cannot stand in a less favorable position, than if he had caused a levy and sale to be made; but his rights are precisely the same, and his superior diligence gives him a preference of the judgment creditors, under whose executions the petitioner purchased.

The view we have taken is decisive of the cause, and as the result cannot be changed, we decline considering the other question discussed. The order of the court of chancery dismissing the petition, and the refusal to permit an ejectment to be brought, (if the latter part of the order is susceptible of revision,) is affirmed.

KNOX v. ABERCROMBIE.

1. The indorser of a bill prays a judgment against himself on his indorsement, and takes from the holder an assignment of a separate judgment against the acceptor; afterwards it is ascertained in a suit in chancery between the holder and the acceptor, that the latter is entitled to a credit on the judgment against himself for \$968 72, which decree is in full force: to the extent to which the judgment against the acceptor is made unavailable by the acts or omissions of the holder, the latter is liable to the indorser in an action for money had and received.

Writ of Error to the Circuit Court of Montgomery.

THE defendant in error declared against the plaintiff in *indebitatus assumpsit*, for money had and received, &c., and the cause was tried by a jury, who returned a verdict in favor of the plaintiff below, for \$1,490 52, damages, on which judgment was rendered. From a bill of exceptions sealed at the instance of the defendant, it appears that Knox & Co. as the holders of a bill of exchange, in the fall of 1838, recovered separate judgments against Riddle as acceptor, Walker as drawer, and the plaintiff as indorser. On the 10th December, 1838, execution issued against the latter, which was superseded by writ of error, and the judgment affirmed by the supreme court, in the year 1839. An *alias fieri facias* was issued against the plaintiff on the 22d October, 1839, the execution of which was suspended by the order of Knox & Co's attorney. On the 19th December, 1839, a *pluries fi. fa.* issued against the plaintiff, which was levied on four slaves; in February, 1840, he filed his bill and enjoined the judgment, alleging equities between the parties to the bill of exchange, and that Knox & Co. would not give him the control of their execution against the other defendants—that payments had been made by Riddle—making all the parties to the bill of exchange defendants to the bill, and praying that proper credits should be made on the execution.

This bill was answered by Riddle, on the 10th March, 1840, alledging that he had paid, or was entitled to a credit of \$2,256—of which sum he paid \$886 06, in cash, including costs and sheriff's commissions; the residue \$1,370 was the amount of a judgment obtained by Knox & Co. upon their garnishment to one Mitchell. Riddle however averred that he had received a credit on the execution for only \$702—makes his answer a cross bill against the other parties, prays an account of credits, and that an injunction may be awarded. An injunction was accordingly granted.

On the 26th May, 1840, the plaintiff in the present case answered the cross bill, and on the 22d June of the same year, the defendant answered, admitting that he had received \$520, and no more; that his attorneys had informed him that they had collected \$480, but did not know by whom it was paid.

In August, 1841, the injunctions were dissolved, and the bill of Abercrombie dismissed, but on motion of Riddle's solicitor leave was given to amend. Appeals were taken from these decrees, and affirmed in the supreme court. In June, 1842, Knox assigned to Abercrombie the judgment against Riddle for \$5,323, as expressed in a written instrument, and in the following month references were ordered in both the cases of Abercrombie and Riddle, to ascertain what amount they had paid, and to what credits the latter was entitled in equity. In July, 1843, the register reported that Riddle had lost \$968 72, by the neglect of the defendant to pursue the judgment recovered upon the garnishment against Mitchell, and that it should be allowed as a credit in his favor. This report was confirmed, and a decree rendered by which it was adjudged, that the judgment against Riddle should be credited with the sum last stated.

The court, after having refused to give several charges prayed by the defendant, charged the jury, that although Abercrombie may have been notified, or had a knowledge of the set off or defence by Riddle, yet if he paid his money upon an open or unsatisfied judgment, the payment was not voluntary, and he may recover it back to the extent of the set off, or defence, which the decree determined that Riddle was entitled to, against the judgment of Knox & Co.

J. A. ELMORE, for the plaintiff in error, insisted that Abercrombie had voluntarily paid the amount due upon the judgment of Knox & Co. against him, and could not therefore recover back a sum equal to that which had been allowed by the court of chancery as a credit upon the judgment against Riddle. If he was entitled to relief, he could not obtain it by the remedy he had adopted.

J. E. BELSER and S. F. RICE, for the defendant in error contended, that Abercrombie was entitled to an action against Riddle for his reimbursement. Knox by his neglect, had impaired that remedy, so that Riddle was not answerable to Abercrombie for a part of the sum he had paid, and to this extent he was entitled to charge Knox. The decree of the chancery court was unreversed, and of course conclusive against Knox. There could be no objection to the form of action that had been adopted.

COLLIER, C. J.—The action for money had and received, it may be laid down generally, lies for money which *ex æquo et bono*, the defendant ought to refund, as for money paid by mistake, or upon a consideration which fails; or for money obtained by imposition, extortion or oppression; or by taking an undue advantage of the plaintiff's situation. [3 Mass. Rep. 74; 1 Wend. R. 360; 6 Sergt. & R. Rep. 369; 2 Burr. Rep. 1012.] It may be maintained on a consideration which has failed, or on a contract rescinded, or not performed. [1 Esp. Rep. 150, 268; 4 Id. 221; 4 Taunt. Rep. 334; 2 W. Bla. Rep. 1078.] Money paid on a judgment that is afterwards reversed, may be recovered back in this action, unless its retention by the defendant is consistent with equity and good conscience. [7 Ala. Rep. 484; 5 Stew. & P. Rep. 119; 1 Har. & Johns. Rep. 405; 6 Cow. Rep. 297; 13 Sergt. & R. Rep. 292; 10 Wend. Rep. 354.] So also for money paid on an execution issued on a satisfied judgment. [5 Cow. Rep. 488; 15 Wend. Rep. 321.]

In *Brown v. Williams*, 4 Wend. Rep. 360, it was held that assumpsit for money had and received will lie by an indorser of a note against the holder, to recover back money

paid under a judgment against such indorser, where the holder previous to the payment made an arrangement with a prior indorser, by which he discharges him, or enters into a covenant not to sue him. So, money collected under an execution issued on a judgment irregularly entered, may be recovered back in *assumpsit*. [Mipor's Rep. 71.] Where a judgment was regularly recovered in an action for the rents and profits, &c. the judgment debtor was allowed to recover back in another action the money paid by him in satisfaction of the judgment—on the ground that it had been since ascertained, by the reversal of a judgment against another person, that the judgment creditor was not entitled to retain the rents and profits so recovered by him. [15 Mass. Rep. 207.] In *Fowler v. Shearer*, 7 Mass. Rep. 14, it was held, that where an attorney in whose hands a note was placed for collection, received part pay thereof after action commenced, but notwithstanding took judgment for the whole amount of the note on the default of the maker, the latter might recover of the attorney the money so paid, though the attorney had paid it over to the creditor. [See also, 3 H. & Johns. Rep. 218; 4 Id. 66.]

It is said that if a person with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, though attempted to be enforced by legal proceedings, it will not be considered as paid by compulsion, and he cannot recover it back. [1 Esp. Rep. 279; 2 Id. 572; 5 Taunt. R. 147; 4 B. & C. Rep. 290.] If the party is obliged to pay in order to obtain possession of the thing to which he is entitled, the payment is not voluntary, but compulsive, and may be recovered back. [7 B. & C. Rep. 85.] Let this brief citation of authorities suffice to furnish principles and analogies to guide our determination in the case before us.

Here the plaintiff, as the indorser of a bill of which Riddle was the acceptor, pays off a judgment which the holders had recovered against him, and takes an assignment of a separate judgment recovered by them against Riddle. When these several transactions took place, the right of Riddle to a credit for the loss consequent upon the failure of Knox & Co. to enforce a collection of their judgment against Mitchell, the

garnishee, was not established. But this right was subsequently ascertained and settled by a decree in chancery. Under these circumstances, we think it clear that the plaintiff cannot be concluded by the payment he made to the defendant, upon the ground that it was voluntary. He did not only not pay his money until there was a judgment against him, but waited until an injunction as to that judgment had been dissolved. It was certainly competent for him to satisfy the judgment against himself, without awaiting the levy of an execution upon his property.

When the plaintiff paid the judgment against himself, on the bill, even without an assignment of the judgment against Riddle, he would have been remitted to his remedy against Riddle as the acceptor, and was entitled thus to reimburse himself. If the defendant impaired that remedy by having received a part of the money of Riddle, or discharged him from its payment by his acts or omissions, *pro tanto*, the plaintiff is entitled to recover back what he has paid the defendant. As to the form of action in which this right may be made available, we think it unquestionable that it is that which has been adopted in the present case.

The decree of the chancellor upon the report of the register is conclusive, (until reversed,) of the matters determined by it; at least as it respects the parties before us. It indicates the extent to which the plaintiff is barred of his remedy against Riddle, and thus admeasures the extent of the defendant's liability.

This view is decisive of the case; the judgment is consequently affirmed.

LACY, TERRELL & CO. v. ROCKETT.

1. Before the passage of the act of 1846, the filing of a plea *puis darrein continuance*, tacitly superseded all other pleas previously filed, and the plaintiff should not have demurred, because the defendant was not entitled to a trial on the latter; but should have presented the question to the court on suggestion or motion, and if the decision was adverse to him, he should have excepted, and thus raised for a revising tribunal the effect of a plea *puis darrein continuance* upon the previous pleadings in the cause.
2. The bankrupt act of 1841, in virtue of the decree of bankruptcy, divests the bankrupt of all property and rights of property, except as therein provided, and declares that all suits pending to which he is a party shall be prosecuted or defended by the assignee to their final conclusion, in the same way, and with the same effect, as they might have been by the bankrupt himself: consequently, the assignee must be made a party to the litigation which may be pending in favor of, or against the bankrupt, or it cannot progress to a trial.
3. The assignee in bankruptcy may be made a party by motion, or perhaps by *scire facias* to a suit in which the bankrupt was a party when he was declared such. And perhaps where the assignee in a proper case fails to come in as a plaintiff, the defendant may suggest the plaintiff's bankruptcy, and upon the production of the decree, the court may order the assignee to make himself a party within a limited time, and in default thereof, the suit to abate for want of prosecution: but however this may be where the fact of bankruptcy is not controverted, it is competent for the defendant to plead *in bar* to an action by the bankrupt himself, the decree declaring the plaintiff to be a bankrupt. The effect of this plea may be avoided by the assignee's making himself a party; but if he replies, and the issue is found against him, or he demurs and his demurrer is overruled, and he does not plead further, judgment will be rendered for the defendant.
4. Where the plaintiff consents to receive an incomplete plea, or a plea in short according to the usual practice, which would be an available defence if the sketch or outline were put in form, it cannot be held bad on demurrer.
5. A plea by the defendant that the plaintiff was declared a bankrupt *pendente lite* need not alledge any thing in respect to the jurisdiction of the court in which the proceedings in bankruptcy were had; for it will be intended that these were in the proper tribunal.
6. *Quere.* Is it not a good plea that some of the plaintiffs, all of whom were a partnership, were declared bankrupts *pendente lite*?

Writ of Error to the County Court of Jefferson.

THE plaintiffs in error declared against the defendant on a bill of exchange for \$400, of which he was both the drawer and indorser. The bill was addressed to, and accepted by T. W. Rockett, dated at Elyton, 25th January, 1842, and payable at ninety days after date.

The defendant pleaded—1. *Non-assumpsit*. 2. The “bankruptcy of the plaintiffs.” 3. *Puis darrein continuance*, that each of the persons composing the firm of Lacy, Terrell & Co., since the suing of the writ, on the — day of —, one thousand eight hundred and forty —, in the district court of the United States holden at Tuscaloosa, filed his petition in bankruptcy for the benefit of the act of Congress of 1841, establishing a uniform system of bankruptcy throughout the United States; and afterwards, on the — day of —, in the year of —, were by that court decreed bankrupts according to the provisions of the act then in force: and thereby, and in virtue of the act, all the plaintiffs’ interest, (if any they had,) in the bill, passed to Edward F. Comegys, the assignee in bankruptcy for the middle district of Alabama: this he is ready to verify. 4. *Puis darrein continuance*, the said Robert Lacy and John D. Terrell have by the district court of the United States held at Tuscaloosa, on the — day of —, in the year —, been decreed bankrupts according to the act of Congress in such case provided; and have since, according to the provisions of the act, received a certificate of discharge from all their liabilities; and by the decree all the right and interest of Robert and John D. to, and in the bill declared on, passed to, and became vested in E. F. Comegys, assignee in bankruptcy for the middle district of Alabama: this he is ready to verify, &c. To each of these pleas the plaintiffs demurred, their demurrers were overruled, and judgment rendered for the defendant.

W. S. MUDD, for the plaintiffs in error, insisted that the demurrers to the first and second pleas should have been sus-

tained, because these were waived by the third and fourth pleas. [2 Por. Rep. 386.] The second plea is also bad, because it is wanting not only in form, but does not state a substantial defence. [4 Porter's Rep. 232; 5 Ala. Rep. 451.]

The third and fourth pleas are bad, because it is not stated that the matter of them happened since the last continuance, and on what day the defence arose, [1 Chitty's Plead. 699;] because they do not alledge that E. F. Comegys was appointed by the court assignee in bankruptcy; because the matter they alledge, if available, can only be good in abatement, and should have been so pleaded; because the assignee might permit the action to progress in the plaintiffs' names—the act only requiring him to prosecute and defend; because they do not present matter of defence to the action. If the assignee allows the plaintiffs to recover a judgment, no one else can object; for if the judgment is satisfied, the defendant will be discharged. [5 Ala. Rep. 135; 1 Chitty's Plead. 14–25; Archb. Civ. Plead. 47.]

The third plea is bad for repugnancy—it alleges that the plaintiffs filed their petition in 1840, and that the bankrupt act was passed 19th August, 1841; and all of them are bad in other respects. [5 Hill's Rep. (N. Y.) 317–327.]

W. S. ERNEST, for the defendant. A bankrupt cannot prosecute an action in his own name, and the defendant may plead the fact of bankruptcy specially in bar. Where one of several partners is declared a bankrupt, the assignee must join with the solvent partner in an action upon a liability to the firm. [Chit. Plead. 23, 24; Story on Part. 445, *et post*; 5 Cranch's Rep. 289.]

COLLIER, C. J.—The third and fourth pleas were filed in 1843, and are not controlled in their effect upon the previous pleadings by the act of February, 1846, which provides “that hereafter, where a plea *puis darrein continuance* shall be pleaded, it shall not be held to be a waiver of other pleas to the merits before pleaded,” &c. Previous to this enactment, the filing of a plea *puis darrein continuance* tacitly superseded all others previously filed, without the action of the court, unless they themselves were defective. But the ques-

tion of the waiver of the first and second pleas, we incline to think cannot be raised on demurrer. If a defendant insists upon having the benefit of all his pleas, and he is sustained by the court, the plaintiff should except, and thus present to a revising tribunal the effect of a plea *puis darrein continuance* upon the previous pleadings in the cause. But if we were to hold that the act cited was applicable, the plaintiff would not be in a better condition, if either the third or fourth pleas were available as a bar. In that event, he would not be prejudiced by overruling the demurrer to the plea of *non-assumpsit*; for the judgment against him upon the other pleas would estop him from trying an issue of fact, and put an end to the cause.

In considering the third and fourth pleas, it may be well to notice the bankrupt statutes of England, and the decisions upon them so far as pertinent, in connection with our own enactments upon the subject. The 12th § of the 6 Geo. 4, ch. 16, in conformity to the provisions of the 13 Eliz. ch. 7, § 2, vests, by virtue of the commission and the statute, a power in the commissioners over all the bankrupt's real and personal estate, proceeds to direct them by the 63d § to assign to the assignees all the personal estate of, and the debts due to the bankrupt. By this section it is said to be imperative upon the commissioners to convey the personal estate and debts due, to the assignees. [Eden's Bank. L. 224.] So that it would seem it is not the suing out of the commission in bankruptcy and the appointment of commissioners which passes the bankrupt's estate to the assignees. Under these statutes it has been held, that if the plaintiff in an action at law become bankrupt, the action does not abate, but the assignee must proceed in the name of the bankrupt till either an interlocutory or final judgment is obtained. In 1 T. Rep. 463, Buller, J., said, "the rule is, that the assignees cannot make themselves parties to the record in any intermediate stage of the proceedings, but it must be immediately after judgment, though an interlocutory judgment is sufficient for that purpose." [Eden's Bank. L. 347.] For any debt due to the bankrupt, and for injuries to his property previous to his bankruptcy, the action must be commenced in the names of the assignees. But if the action be commenced by the bankrupt before his bankruptcy, the assignees may either

proceed in that action or commence a new one. If they continue the suit, they must proceed in the bankrupt's name to judgment, when, and not sooner, they may make themselves parties to the record by *scire facias*. [2 Archb. Prac. 93, 160, 300, and cases there cited.]

The bankrupt act of the United States passed in 1800, it was decided, consolidated the decisions of the English statutes of bankruptcy; consequently, the English decisions on the subject are applicable in its construction. [3 Mass. Rep. 511; 5 Ib. 249; 6 Johns. Ch. R. 266. See also 1 Yeates' R. 399; 1 Root's Rep. 139; 1 Mass. Rep. 135; 1 Binn. R. 263.] The act of 1841 was intended to be exceedingly clear and simple in its provisions, and much less complicated and expensive in its execution. The third section declares that all the property and rights of property, of every bankrupt, except as hereinafter provided, who shall by a decree of the proper court be declared to be a bankrupt within this act, shall by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment or other conveyance whatsoever; and the same shall be vested by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, &c.; and all suits at law or in equity then pending, in which such bankrupt is a party, may be prosecuted or defended by such assignee to their final conclusion in the same way, and with the same effect, as they might have been by such bankrupt.

The provisions of this section are very explicit in substituting the rights of the assignee to the rights of the bankrupt, and in conferring the right to prosecute or defend all suits pending at the time of the decree of bankruptcy. By divesting the bankrupt of the legal right to what he is seeking to recover, it would seem that the remedy was also gone, and that no action could be commenced or maintained which was not authorized by some exception to the general terms employed. This conclusion is not weakened by the authority conferred upon the assignee to prosecute or defend suits brought by or against the bankrupt; but this latter provision shows that the assignee must himself become a party to the pending litigation, in order that it may progress to a trial.

If, after stripping the bankrupt of his estate, it was intended to allow the prosecution or defence to be conducted in his name, it would have been easy, and perfectly natural to have so expressed it in the act. Such an extension of terms, we think, cannot be justified by construction. In *Fisher v. Vose* 3 Rob. Rep. (Louis.) 457, it was said, where a party to a suit pending in a State court applies to be declared a bankrupt under the act of Congress of 1841, the proceedings must be suspended for a reasonable time, to enable him to file the decree, when the assignee must be made a party. As soon as the decree in bankruptcy is pronounced, the bankrupt in relation to all actions for and against him, except such as the statute prescribes, is legally dead, and can only be represented by the assignee.

The questions then* are, can the failure of the assignee to become a party be taken advantage of by plea, and does either the third and fourth pleas warrant the judgment for the defendant. In providing that the vitality of the action shall not be lost if the assignee elects to prosecute it, the act necessarily confers the right to revive, according to the usual mode of revival, where suits are suspended by the right in controversy devolving upon some person who is not a party. It would then be competent to make the assignee a party by motion, or perhaps *scire facias*, upon producing the decree in bankruptcy, which confers on the assignee the bankrupt's right of property, and the remedy to make it available. Where the assignee does not pursue this course, I think the defendant may suggest the plaintiff's bankruptcy, and upon his showing that such a decree has been rendered against him, the court may order that the assignee make himself a party within a limited time, or that the suit abate for want of prosecution. [See *Lord Huntingtower v. Sherborn*, cited from 3 Am. L. Mag. 428.] This mode of proceeding seems to me most conformable to the usual practice in analogous cases. My brethren however, are of opinion, that conceding this practice to be regular, where the fact of bankruptcy is not controverted, it is altogether competent for the defend-

ant to plead that the plaintiff who is prosecuting the suit was declared to be a bankrupt by the proper court, subsequent to its institution. And as such a decree is a perpetual bar to the *bankrupt himself*, the fact may be pleaded as a bar to the action. [See 15 East's Rep. 622 ; 1 Murp. Rep. 161.] But the assignee may avoid the effect of such a plea, by submitting to make himself a plaintiff. If however, he takes issue upon it, and it is found against him, or he demurs and his demurrer is overruled, and he does not plead further, judgment must be entered for the defendant. As this is a mere question of practice, from the decision of which, according to the views of my brethren, no inconvenience can result, I acquiesce in their opinion. If the assignee elects to bring a new action, the judgment against the bankrupt upon the third and fourth pleas cannot be pleaded in bar.

In respect to the completeness of the pleas, it may be remarked, that it is stated in each of them, that they were pleaded "in short by consent." By this we understand that they were intended to be nothing more than a mere outline, or sketch of the defence they respectively set up, and that the plaintiff assented to this mode of pleading. This is the view which we have repeatedly taken of such pleas, and following our previous decisions, we cannot affirm that those we are considering are defective. If the outline or sketch was completed by putting the plea in form, we have seen that the bar would be perfect. Although it has been held, that in pleading a bankrupt's discharge, the facts necessary to give the court jurisdiction of the proceeding in bankruptcy should be set forth, (Sackett v. Andross, 5 Hill's Rep. 327 ;) yet a plea by the debtor, that his creditor was declared a bankrupt *pendente lite* need alledge nothing in respect to the jurisdiction, for it will be intended that the creditor filed his petition in the proper court.

As the third plea was a good bar to the action, and will support the judgment for the plaintiff, it is scarcely necessary to consider whether the fourth, which alleges the disability of only two of the defendants can be sustained. We

will however refer to Story on Par. 483-4, in which it is said, that actions at law, after the bankruptcy of one of the partners, must be brought jointly in the names of the solvent partners, and the assignee in bankruptcy who succeeds equally to his rights of action, as well as his rights of property.

We have only to add, that the judgment of the county court is affirmed.

BROWN v. ISBELL.

1. B., by a contract in writing, transferred to L. a note made by L. for the payment of \$2,000, which was past due, stipulating that it should be *first paid* from the proceeds of certain lands, &c., which L. bought from B., and for the sale of which B. had filed a bill in chancery, &c.: *Further*, that if the lands, &c., did not bring the amount of the note when sold under the decree in chancery, then B. would pay the deficiency: *Held*, that in declaring upon the contract, it is sufficient to alledge that the decree had been rendered in the chancery suit, that the lands, &c. had been sold under its authority, that the amount produced by the sale was insufficient to pay the note, and what the deficiency was; without alledging that B., who was the complainant in chancery, had notice of these facts: *Further*, that the contract being a writing, separate from and independent of the note, could not be treated as an indorsement thereof.
2. It is competent for the plaintiff, under the act of 1837, to sue out an ancillary attachment, not only where a suit is commenced by summons or *capias ad respondendum*, but where an original attachment is the leading process in the cause; yet it would perhaps be to quash the ancillary attachment, or the levy thereof, where the estate of the defendant levied on under the original, was unquestionably ample to satisfy the plaintiff's demand.
3. The original papers in a cause are not admissible evidence, if the final record has been made up as required by the statute.
4. Where the plaintiff declares upon a written contract which assigns a bill single, sets it out *in extenso* and stipulates to pay it, if the means of payment shall not be provided by another source, he will not be required to

produce it at the trial—its production not being necessary to entitle him to recover, and it not appearing to have been in his possession.

5. Parol evidence of contemporaneous stipulations is inadmissible to control or vary the legal effect of a written instrument; but where the writing is incomplete and does not profess to set out the entire contract, parol evidence has been received to prove the part omitted. So if the writing merely contains an acknowledgment of *value received*, without stating what it was, it is competent for the party sued on it, to show what the consideration was, and that it has failed, either in whole or in part.
6. R., upon the payment to B. of the sum of \$550, was entitled to receive \$800, being part of the amount of a note which B. as the payee, held against L.; B's agent received the \$550 of I, and assigned him the note by a separate writing, stipulating that B. should pay it to I, if the latter failed to collect it by the sale of certain property of L.—I. at the same time had other demands against R., which by the advance of money made for him, he professed to collect from the proceeds of the note: *Held*, if I. was merely substituted for R. in accepting the assignment, or received it in trust for R's benefit, either in whole or in part, and it can be inferred he became the assignee under an agreement that such sets off, as B. was the proprietor of, beyond the \$800 against R. should be allowed, then these sets off would be admissible in an action by I. against B. on the assignment. But in the absence of an agreement upon this point, either express or implied, the indebtedness by R. to B. is not admissible as a set off to diminish the recovery of I.
7. Evidence that an assignee holds a paper in trust for another, and not in his own right, does not contradict the assignment, and in a proper case is admissible.
8. Where it is shown or can be intended that a paper is in the possession of a party and in court, so that it can be produced without delaying the trial, a notice at the trial will perhaps be sufficient to let in secondary evidence of its contents, if it is not produced.
9. A party cannot defeat a recovery against himself by alledging that a judicial proceeding in which he was the actor was irregular, where the action against him is founded on a contract by which he stipulated to prosecute it to a close, and a decree was rendered and executed previous to the institution of the action.
10. Where the report of a sale by a register in chancery is confirmed, the confirmation relates back to the time of the sale, so that an action instituted between the two periods, founded upon a contract by the complainant, to make good what the sale failed to produce short of a certain sum, is not prematurely brought.
11. Where a prayer for instructions to the jury, is predicated of evidence not before them, it should be denied.
12. Where the assignee of a note simultaneously with the assignment, receives of a third person a note for the amount which he advanced for him,

and which induced the assignment, it cannot be assumed that such note has been paid; but if it has, the assignee may still maintain an action against the assignor for the benefit of the party paying it.

Writ of Error to the Circuit Court of Talladega.

THIS action was commenced by original attachment at the suit of the defendant in error, against the plaintiff as a non-resident debtor, which was levied on a wagon and gear. Afterwards an ancillary attachment was issued and levied on three slaves, particularly described in the return. The first count of the declaration is upon a writing set out according to its tenor as follows, viz: "For value received, I transfer and indorse to James Isbell, to be first paid out of the proceeds of the sale of the lands and mills which the Longs bought from me in the year 1840, and for the sale of which said lands and mills, I have filed a bill in the chancery court at Talladega, the following described note, to wit: '\$2,000. By the 25th December, one thousand eight hundred and forty-two, we or either of us promise to pay Warner Brown or order, two thousand dollars, for value received. Witness our hands and seals, this 14th February, 1840. John Long, (Seal,) James Long, (Seal,) Wm. F. Long, (Seal.)' Said note is entitled to a credit of four hundred and fifteen dollars and fifty cents. Said note has been presented to the administrators of Wm. F. Long's estate, both in Alabama and Tennessee, and filed with the clerk of the county court of Talladega county. If the said lands and mills do not bring the amount of the above described note when sold by the decree of the chancery court, then, in that event, I bind myself to make good all deficiency which shall or may accrue on such sale, 24th July, 1844. Warner Brown, by W. W. Knox, his attorney in fact."

The declaration then proceeds to alledge that a decree was rendered in the suit in chancery referred to in the writing above set forth, directing a sale of the land and mills in parcels at, &c. for cash. From the proceeds the Register was directed, first to pay a sum due N. & H. Weed & Co., with the costs thereon; then the costs of the suit; and last-

ly, the note described in the writing declared on. It is then averred that a sale of the premises was made pursuant to the decree, previous to the commencement of this action, and that the sum thereby produced was only one hundred and twenty-seven dollars; that the amount reported to be due to N. & H. Weed & Co., was fourteen hundred and twenty-five dollars and twenty-three cents, besides costs; so that there was nothing that was, or could be appropriated to the plaintiff's demand, &c. By means whereof the defendant became liable, &c.; thereupon in consideration of the premises, the debt promised, &c. The second count embraced the common counts in *assumpsit*. To the first count the defendant demurred, and his demurrer was overruled.

The defendant moved to quash the *ancillary attachment*, because the *original attachment* had been levied on goods of the defendant, and by summoning a supposed debtor of his as a garnishee, which motion was overruled and the defendant excepted. Thereupon the cause was submitted to a jury on issue joined, a verdict was returned for the plaintiff and judgment thereon rendered. A bill of exceptions was sealed on the trial, at the instance of the defendant, which presents the following points: 1. The plaintiff offered in evidence the writing declared on, and the defendant objected to its admission on the ground that it varied from the description in the first count, and was incompetent, under either count; but his objection was overruled, and the paper permitted to go to the jury. 2. The plaintiff then produced the original papers, viz: the bill, report of the register, decree, &c. in the chancery suit to which the writing referred; all which were admitted in despite of an objection by the defendant, though it appeared that a final record had been made of them by the register as directed by the statute. 3. The specialty executed by the Longs and described in the instrument declared on, was not produced at the trial, or its absence accounted for; but Knox proved that he made that instrument as the attorney in fact of the defendant pursuant to an authority. This witness being cross-examined by the defendant, stated that he was appointed by the defendant when he removed from this State, his attorney, that the defendant left with him the control of the note on the

Longs, informing him that he had indorsed for one Riddle, and had claims against him, which, if Riddle should afterwards have a right of action against him, (Brown) would reduce his right to recover upon the note, to some six or eight hundred dollars. Witness testified that Riddle had made some unsuccessful efforts to raise five hundred and fifty dollars, which he was bound to pay to Brown before he was entitled to the note upon the Longs. Riddle and plaintiff had an interview, and plaintiff called upon witness to learn how the matter of account stood between the defendant and Riddle in respect to the note; to which witness answered in the presence of Riddle, that upon the payment by the latter of \$550, he would be entitled to the note; that if its amount was not realized from the chancery suit, then Riddle would have recourse upon defendant; that defendant had set off against the note, which would leave Riddle's interest in it from six to eight hundred dollars; and when the \$550 were paid it would be a good demand against the defendant for the six or eight hundred dollars. Witness also informed the plaintiff that he had authority to make the contract which he executed. Plaintiff objected to all the evidence of this witness, except so much as affirmed his authority as the defendant's agent, and the execution of the instrument, on the ground that it varied the terms of the writing. Witness further stated that plaintiff said Riddle was indebted to him, that he would advance the \$550 and take his interest in the note; thereupon plaintiff paid that sum and witness executed the writing declared on. Plaintiff at the same time took Riddle's note for \$550, and what he was otherwise indebted to him, which note was attested by witness. Defendant then gave notice to plaintiff to produce the last named note, but it was not produced, though the trial was in progress for some hours afterwards. This was all the evidence adduced by either party.

The court charged the jury as follows: 1. The papers in the chancery cause showed that the land had been sold, and no part of the note set out in the guaranty had been realized; this made the conditional guaranty an absolute promise, and the plaintiff was entitled to a verdict for the amount guaranteed, with interest thereon; and it was not necessary that

the plaintiff should prove a notice to the defendant of the non-payment of the note from the proceeds of the sale of the land. 2. That the jury could not regard the testimony of the witness Knox as to any verbal understanding which would vary the terms of the written contract.

The defendant's counsel prayed the court to charge the jury as follows. 1. That if they believed all the evidence admitted, that they should find for the defendant. 2. If the plaintiff has not produced the note made by the Longs, and described in the writing declared on, or accounted for its non-production, then they should find for the defendant. 3. If the jury believe there was any fraudulent intent on the part of the plaintiff towards the defendant, or Knox as his attorney in taking the instrument made by the latter, then they ought not to find for the plaintiff more than eight hundred dollars and interest thereon from its date. 4. That the sale of the lands shown by the chancery papers was void: *Further*, that it was not such a sale as the instrument contemplated. 5. If the statements and representations which Knox testified that he made to the plaintiff, before the latter advanced his money are true, then the plaintiff is not entitled to recover more than six or eight hundred dollars, with interest. 6. If Riddle paid to plaintiff the note which Knox proves he gave him, then the plaintiff cannot recover. Each of these charges were refused, and the defendant excepted to the refusals and the charges given.

S. F. RICE, for the plaintiff in error, made the following points: 1. The demurrer should have been sustained, because the first count does not alledge a non-payment by the Longs of their note—it does not aver that they were insolvent, or that a demand was made of them—nor does it show that the note was unpaid by them, or unextinguished by the proceeds of the land sold. [2 Ala. Rep. 373.] *Again*, the contract sought to be enforced, is an irregular indorsement of an assignable instrument; and the same rules apply to such a transfer as to an indorsement in the ordinary course of business. [1 Ala. Rep. 471; 3 Id. 610, 648; 4 Id. 110; 6 Id. 746; Hines v. Mullikin, at this term; 7 Mass. Rep. 480.]

2. An ancillary attachment can only rightly issue in a suit

commenced by process which is required to be personally served on the defendant. It can only issue for matters accruing after the suit is brought, and certainly not after the levy of an original attachment.

3. A restitution bond, such as the statute requires where there are infant defendants, was not executed previous to a sale under the decree, though there were minor defendants whose interests were affected. For this cause the decree was void *in toto*, and is not validated by the subsequent confirmation of the register's report. [4 Hump. R. 273; 5 Ala. R. 158.] If the decree is valid, the sale by the register is not complete, until it is confirmed by the chancellor, [4 Hump. R. 371]; and the fact might be shown under the general issue, to defeat the action as prematurely brought. 9 Ala. R. 754.

4. After the final record was made up in the chancery cause, the original papers were not admissible evidence. [8 Miss. R. 115; 9 Ala. R. 973.]

5. The plaintiff was bound to know the extent of Knox's authority as the agent of the defendant, and Knox's statements made to him before he advanced his money were admissible to show the nature of the contract, [4 Ala. R. 194; 1 Id. 161, 436; 5 Porter's R. 498; 8 Id. 114]; and perhaps warrant the inference that the instrument sued on was obtained by the fraud of the plaintiff.

6. If the note of the Longs was paid even by a stranger, it discharged the defendant from all liability to the plaintiff; and the payment of Riddle's note would have the same effect. [10 Pick. R. 121.]

7. The failure to produce the note of the Longs, or the note of Riddle to the plaintiff, tended to establish their payment, and also the fraud of the plaintiff. However weak it may have been, its effect should have been permitted to go to the jury. [8 Metc. R. 436; 8 Ala. R. 900.]

L. E. PARSONS, for the defendant in error, insisted, that the suing out of an original attachment was the commencement of a suit, and might be followed by an ancillary attachment. [7 Ala. 601; Clay's Dig. 61, § 34.] The refusal to quash on motion is not revisable on error. [2 Stew. & P.

406 ; 5 Id. 158 ; 3 Ala. 57 ; 6 Id. 154.] And being addressed to the discretion of the court, a *mandamus* to compel the circuit court to grant the motion will not be granted. See cases collected in 2 Kinnie's Law Com. 138-9.

The irregularities in the suit in chancery, if any, proceeded from defendant's neglect—it was his duty to have executed a sufficient refunding bond, and if he omitted it, he cannot make his omission a defence to this action. If there is a variance between the instrument set out in the first count and that given in evidence, it is immaterial ; especially as it is set out under a *videlicet*. See 2 Ala. 525 ; 6 Id. 151. The plaintiff's right of action was complete as soon as it was ascertained by the sale under the decree, that the note of the Longs was paid *in toto*—to entitle him to sue, it was not necessary that he should have prosecuted an action on that note. [20 Johns. R. 365 ; 7 Peters, 113 ; 10 Id. 482 ; 1 Ala. 473 ; 2 Id. 375.]

The defendant was the actor in the chancery suit, and knew that the sale of the lands did not produce a sufficient sum to pay the note ; it is not necessary for the plaintiff to aver a notice, where a matter does not lie more properly within his knowledge than that of the defendants. [1 Chit. Pl. 320, and note K ; 10 Mass. R. 230, 230.] In respect to the testimony of Knox, it tended to add to and vary a written contract, complete in itself ; and was therefore rightly excluded. [Minor, 270, 357, 363 ; 1 Stewart, 425 ; 3 Id. 40, 87, 201 ; 2 Porter, 29 ; 1 Ala. 42, 164, 358 ; 2 Id. 135 ; 4 Id. 664 ; 9 Id. 513, 527.] There was no evidence from which fraud could be imputed to the plaintiff ; but if there was, it could not prejudice the right to recover, unless there was an offer by the defendant to return to the plaintiff the money he had advanced. [2 Ala. 749.] The original papers in the suit in chancery were admissible, though the final record was made out. [1 Ala. 540 ; 4 Id. 158 ; 6 Id. 710.]

Where evidence is conflicting, the court may with propriety refuse to charge the jury, if they believe all the evidence in the cause, they should find for the one party or the other. [1 Ala. 117.] The non-production of the notes of the Longs and Riddle, could have no effect upon the rights of the par-

ties—if Riddle was willing to trust his funds in the plaintiff's hands, the defendant cannot object that he should not perform his contract; especially as he does not show, that Riddle is his debtor. [4 Ala. 367; 5 Id. 383.]

COLLIER, C. J.—The first count of the declaration is at least substantially sufficient. It professes to set out the contract of the parties according to its tenor. This contract may be thus briefly stated: the defendant, by his attorney in fact, assigns to the plaintiff a bill single previously made by third persons, of which he (defendant) was the payee, the consideration of which was certain lands and mills purchased by the obligors of the defendant. At the time of the assignment, a bill was pending in the court of chancery at Talladega for the enforcement of the equitable lien on the lands and mills, at the suit of the defendant. It was stipulated by the defendant that if the property should not sell for enough under the decree in chancery to pay the specialty to the plaintiff, then he (defendant) would make good the deficiency. Although the contract states that the defendant *transfers or indorses* the specialty, yet as it is affirmed to have been filed in the county court of Talladega, we infer that there was no indorsement in the appropriate meaning of the term. Be this as it may, the defendant is not sought to be charged as an indorser, but on the special contract we have noticed. An indorsement must be made on the *paper itself*, and not by a writing separate and distinct from it, (*Gookin v. Richardson*, at this term); or on another paper annexed thereto, which is sometimes necessary when there are many successive indorsements to be made. [Chit. on Bills, 253; Story on Bills, 225.]

To entitle the plaintiff to recover, it is enough to show that a decree has been rendered in the suit in chancery, that the lands and mills have been sold under its authority, that the amount produced by the sale was not sufficient to satisfy the specialty assigned to him, and what the deficiency is. The first count alleges all this, deduces therefrom the defendant's liability, and promise to pay; and the breach, at the conclusion of the declaration, avers the non-payment of

the sums severally stated in the different counts. According to our liberal system of pleading, which regards matter of substance only, we cannot think it was necessary for the declaration to have been more full and special. Certainly it could not have been incumbent upon the plaintiff to entitle himself to an action, that he should have informed the defendant of the deficiency after a sale under the decree, and demanded payment thereof. The contract, neither in terms, nor under a proper legal interpretation, imposes such a condition, in order to make the undertaking of the defendant absolute. And certainly the rules of pleading do not require that the pleader in such case should alledge a notice, that the event has happened upon which the performance of his adversary's promise may be enforced. The defendant was a party to the suit in chancery, and is in law presumed to have been cognizant of the decree that was rendered, and of all subsequent proceedings. His knowledge upon this point will be intended to have been equal at least to that of the plaintiff; consequently, the declaration need not have alledged a notice. [Carlisle v. The Cahawba and Marion Railroad Co. 4 Ala. R. 70.]

The act of 1837 "to explain and amend the laws in relation to attachments," provides, that when a suit shall be commenced in any circuit or county court, and the defendants, or any one of them, shall abscond or secrete, or shall remove out of this State, or be about to remove out of it, or shall be about to remove his or their property out of this State, or be about to dispose of his or their property fraudulently, with intent to avoid the payment of the debt or demand sued for, on oath being thereof by the plaintiff, his agent, &c. and oath being also made of the sum due, and that an attachment is not prayed for the purpose of vexing or harrassing the defendant or defendants, it shall be the duty of the officer before whom the affidavit is made, on the plaintiff, his agent, &c. entering into bond with security, &c. in double the amount sworn to, conditioned to pay the defendant, &c. all such damages and costs as he, &c. may sustain by the wrongful suing out of the attachment, forthwith to issue the same, &c. returnable to the court in which the suit had been

originally commenced, &c.; and the affidavit, bond and attachment, when returned, shall be filed with the papers in the original suit, and shall constitute a part thereof, and the plaintiff in the suit may proceed to judgment as in other cases, and the original suit shall not be delayed. Property attached under such ancillary attachment may be replevied as in other cases, and the like consequences shall result, and proceedings be had for a failure to deliver it after judgment, &c. And the sheriff shall summon garnishees as under original attachments. [Clay's Dig. 61, § 34, 35, 36.]

A summons, or a writ of *capias ad respondendum* is not necessarily the initiatory process in a cause, but a suit may be commenced by an original attachment issued against the estate of the defendant. An attachment is extraordinary process, and when levied and returned, becomes a suit in court, and if the jurisdiction is maintainable, and the cause of action made out, the plaintiff is as much entitled to judgment as if the suit had been instituted in the ordinary mode. If then the act in question is to be literally interpreted, there is no doubt but an ancillary may succeed an original attachment, and we know of no warrant under the circumstances, for the adoption of a different rule of interpretation. It would perhaps be competent to dismiss the ancillary attachment, or quash the levy thereof, where the estate of the defendant levied on under the original attachment was unquestionably ample to satisfy the demand sought to be recovered. However this may be, if the ancillary attachment was vexatiously sued out, the plaintiff will be liable to respond to the defendant in an action for damages. There is nothing in the record to indicate that the assistant process in the present case operated oppressively or unjustly upon the defendant, or that the levy under both attachments was excessive, and if these facts were affirmatively shown, it might then be asked if the overruling a motion to quash in such case, is revisable on error. The conclusion we have expressed upon this branch of the case, is strengthened from the consideration that the attachment law is remedial—"not to be rigidly and

strictly construed ;" but shall be so expounded as to afford a convenient and sufficient remedy. [See Clay's Dig. 59, § 17.]

The counsel for the plaintiff in error has not pointed out a variance between the contract declared on and that offered in evidence, and from the comparison we have given to them as copied in the transcript, we have discovered no discrepancy.

In *Ansley v. Carlos*, 9 Ala. 973, it was held that the original papers in a cause are not admissible evidence, if the final record has been made up by the clerk as required by the statute. I did not then express an opinion upon the point, and perhaps that case might have been disposed of without deciding it, but my brethren are satisfied that the law is there correctly laid down, the decision is therefore authoritative, and I of course acquiesce. In the case before us, it is distinctly affirmed, that the final record had been made by the register as directed by law, of the papers in the suit in chancery to which the contract declared on, referred, so that the admission of the original papers as evidence was opposed to the case cited, and consequently erroneous.

The plaintiff could not have been required to produce at the trial the bill single made by the Longs, of which he was the assignee. It does not appear that it was in his possession or under his control, nor can it be inferred in the absence of all evidence, that he withdrew it from the custody of the clerk of the county court of Talladega, with whom it was when the assignment was made. It was not the foundation of his action. He declared on a special contract in which the specialty was set out *in extenso*, with an undertaking to pay it, if the means of payment should not be procured from another source. Its production then, not being necessary to entitle him to recover, and it not appearing to have been in his possession, the court very properly refused any compulsory order requiring it to be brought into court.

The competency of Knox to prove that he was authorized to make the contract declared on, is not denied, but it is insisted by the defendant that the declarations of this agent made previous to, and simultaneous with it, are admissible to show the extent of the defendant's liability. We have re-

peatedly held, that the parol evidence of contemporaneous stipulations is inadmissible to control or vary the legal effect of a written instrument. But where the writing is incomplete, and does not profess to set out the entire contract, parol evidence has been received to prove the part omitted; and to authorize the admission of such testimony, it is said not to be necessary that the writing should expressly and directly rebut the presumption of completeness. So it has been held, that, where an executory agreement not within the statute of frauds, expresses no consideration, it is allowable to show what the consideration actually was. And where a writing has been executed by way of part performance of a parol contract, as where a chattel has been sold with warranty not in writing, and a note given for the purchase money, the parol contract is not merged in the note. All these principles have been recognized by us, as well as by English and American decisions. [See 3 Phil. Ev. C. & H's Notes, 1471 to 1476.]

In the case at bar the contract declared on does not profess to set out the consideration, but merely acknowledges that the assignor had *received value* as an inducement to enter into it. According to the principles laid down, it was clearly competent for the defendant to prove by extrinsic evidence what was the true consideration, that he might show it was insufficient, or had failed either in whole or in part, and thus defeat a recovery entirely, or *pro tanto*. If the plaintiff was informed of the agreement between the defendant and Riddle, and was merely substituted for the latter, both in respect to the consideration and the terms of the contract, we should think it would be allowable as against him, to show what the consideration was, in the same manner as if Riddle had been the party contracted with. If the transfer of the note of the Longs was received by the plaintiffs upon trust, either in whole or part for Riddle's benefit, to the extent of Riddle's interest, it would be competent for defendant to set off a demand against him, if it can be inferred that the plaintiff became the assignee under the agreement that such sets off as the defendant was the proprietor of, beyond the sum stated by Knox, (*viz* : six or eight hundred dollars) should be allowed. But in the absence of an

understanding upon this point, either express or implied, we think the indebtedness of Riddle to the defendant is not admissible as a set off to diminish the plaintiff's recovery. Whether the transaction between the plaintiff and defendant, and the statements by Knox to the former, do not warrant the inference that there was such an understanding, is a question which does not arise, and which the evidence as recited in the record would not enable us to determine.

Evidence that the plaintiff holds the specialty assigned to him in trust for another, and not in his absolute right, will not contradict the assignment—it admits and affirms it, and establishes a fact beyond and independent of it. Such evidence is admissible both on principle and authority. [3 Phil. Ev. C. & H's Notes, 1473, and cases there cited.]

It cannot be intended that the note given by Riddle to the plaintiff, was in the possession of the latter or his attorney in court, when he was called on to produce it; if this fact had been shown, perhaps the notice at the trial would have been sufficient to let in secondary evidence of its contents upon the failure to comply. But in the absence of proof that the note could have been produced without delaying the trial, *prima facie* the notice was insufficient. [3 Phil. Ev. C. & H's Notes, 1184 to 1186.]

There is nothing in the record to indicate that the sale of the lands and mills under the decree in chancery was void, and not such as the contract declared on contemplates. The sale must, as the defendant was the actor in the cause, have had his sanction—he should have executed a regular bond for restitution; and if the proceedings consequent upon the decree are in any manner defective, he cannot set up the defect to defeat the plaintiff's action. The confirmation of the register's report of the sale, operated retrospectively, so that the institution of the suit between the sale and confirmation, was not premature.

The evidence recited in the bill of exceptions, does not implicate the plaintiff in a design to defraud the defendant or his attorney, and consequently the prayer for an instruction, predicated of such a hypothesis, was rightly refused.

It was not proved that Riddle had paid the plaintiff the

note which Knox testifies he gave him, and its payment cannot therefore be assumed as a fact. But if this note had been discharged, still it would be competent for the plaintiff to maintain an action for the benefit of Riddle, or whoever might be entitled to what is recovered.

What we have said will be sufficient to guide the ulterior action of the circuit court in the trial of this cause—we have seen that there was at least one error in the points presented for revision—the judgment is consequently reversed and the cause remanded.

REYNOLDS' ADM'RS v. REYNOLDS' DISTRIBUTEEES.

1. The statute which directs that commissioners shall be appointed within three months after the estate of an intestate has been reported solvent, to make distribution of the same, is not imperative on the orphans' court.
2. It is the duty of an administrator, to collect the debts due the estate he represents, and when the assets in his hands, above what is necessary to satisfy the demands of creditors, consist of notes, a decree should not be rendered by the orphans' court requiring their distribution, where some of the distributees are in their minority, although the latter are represented by guardians.
3. Where a person entitled to the distributive share of an estate dies previous to distribution, his personal representative must be brought before the orphans' court, on the final settlement with the administrator, although the distributee was an infant at the time of his decease.
4. The orphans' court has no authority to impanel a jury to ascertain a disputed fact, save only where there is a contest about a will, and one or two other special cases; unless there is a doubt in relation to the controverted fact, which requires a cross examination to elicit the truth. And in a case not coming within the exception, the necessity for a jury must appear on the record, by setting out the testimony. so as to enable an appellate court to revise the order directing a jury to be impaneled.
5. Where an administrator, under an honest claim of right, omits to return a slave in the inventory as a part of the testator's estate, he should not be

Reynolds' Adm'rs v. Reynolds' Dist.

- charged with her value; but if his claim is unfounded, she should be brought into the distribution, and if necessary a sale of her should be ordered.
6. When a jury has been irregularly impaneled by the orphans' court, to try whether a slave was the property of an administrator in his own right, or assets of the estate, and a verdict returned against the administrator, ascertaining the value of the slave, his consent that a judgment should be entered in the form in which the finding of the jury was expressed, is not a waiver of the irregularity, but a mere agreement that the court may, in conformity to the verdict, declare that the slave was assets of the estate, and the value such as the jury had assessed.
7. Where an administrator, in the performance of his duty causes advertisements to be printed in newspapers, he should be allowed on the settlement of his accounts the charges for printing.

Writ of Error to the Orphan's Court of Coosa.

THIS was a proceeding in the court below for the distribution and final settlement of the estate of the intestate of the plaintiffs in error. The facts of the case are sufficiently shown in the opinion of the court.

J. A. ELMORE and L. E. PARSONS, for the plaintiffs in error, made the following points: 1. The order appointing commissioners to distribute the estate and assets of the intestate is irregular in directing distribution to be made of the debts which have not been collected by the administrators. [Clay's Dig. 196, § 22; 1 Ala. 594; 9 Id. 330.] 2. It appears from the record that one of the distributees died previous to the order appointing the commissioners; as it respects his interest, no distribution could be made, until administration had been granted upon his estate. [6 Ala. 607; 7 Id. 9.] 3. The record does not show the existence of such a state of facts as authorized the orphans' court to submit to a jury the determination of the fact, whether the slave Sylva was a part of the intestate's estate, and should have been embraced in the inventory; consequently the verdict upon this issue should not have been made the basis of a decree against the administrators. [9 Ala. 330.] 4. If the issue was allowable, it was irregular to charge the administrator with the va-

lue of the slave, as no conversion was shown—she should have been sold, and the proceeds distributed, if an equitable distribution could not have been otherwise made. [2 Por. 328, 341.]

W. W. MORRIS, for the defendant in error. Francis Reynolds, the deceased distributee, died in infancy, his estate consequently cannot be presumed to be chargeable with debts; it must therefore be taken to have vested in his heirs, and no administration was necessary to authorize the orphans' court to settle with the administrators. [Clay's Dig. 168, § 2; 191, § 1.] The proceeding in respect to the slave, Sylva, to ascertain whether she belonged to the intestate's estate, &c. was not opposed to the law, although it may not have been directed by it. [2 Porter, 328.] There is nothing in the record to show that the administrators have been prejudiced by the action of the orphans' court; in fact the reverse is inferable, and they cannot be heard to complain. [9 Ala. 470, 731.]

COLLIER, C. J.—The statute directs that commissioners shall be appointed within three months after the estate of an intestate is reported solvent, to make distribution of the same among the persons entitled to it: "*Provided*, that when such division and distribution cannot be equitably effected without manifest injury to the legatees, or other legal representatives, in that case such estate shall be exposed to public sale as heretofore." Clay's Dig. 196, § 22.

It is recited in the order appointing commissioners in the case at bar, that the aggregate of the estate of the intestate to be distributed, amounts to \$6,680 52½, "all being notes, the proceeds arising from the sale of said personal estate, except \$659 of said effects, to be reserved to the said administrator, to discharge certain supposed existing debts against said estate. The commissioners reported that they had distributed the property mentioned in the order appointing them; specially stating how much was set apart to the widow, and each of the distributees. This report was confirmed by the

Judge of the orphans' court, and ordered to be recorded as a partial settlement of the administration. All these proceedings, we think, were irregular. It is certainly a prominent duty of an administrator to collect the debts due the estate he represents, and though it may be competent to direct him to make partial settlements and partial distributions, as the assets may be realized, yet he should not be divested of the notes, and evidences of debt, of which the law makes him the proprietor, for the benefit of others. He is entitled to receive the money if voluntarily paid, and must sue on them if legal coercion is necessary to recover it. Although the statute prescribes a time when commissioners shall be appointed, and distribution made, yet it cannot be regarded as imperative; but it must be so construed as to require distribution in the event that the estate is in a condition to distribute. [Leavens v. Butler and wife, 8 Port. Rep. 380.]—Whether, if all the distributees had attained their majority, and were capable of binding themselves by their own acts or assent, a distribution of the credits and choses in action of the estate, at their own instance, would not be unobjectionable, we need not inquire. Here it is apparent from the record, that some, if not all the distributees, except the widow, are in their minority; and the latter at least cannot be foreclosed by their own consent; nor can their guardian receive their shares of the estate in claims upon third persons due the administrator. Each distributee is entitled to share equally in the estate of the deceased relative; and this result can only be insured by distributing the money due upon notes and other choses, after it shall have been collected. For though it may be supposed by the commissioners that they are all collectable, yet it may so happen that in this they will be mistaken, and the shares of some be greatly diminished. If they shall consider some of the choses as more likely to be paid than others, their authority cannot permit them to take this into the estimate, and allot to those who receive the best paper a smaller amount nominally.

2. In *Boyett, et al. v. Kerr*, 7 Ala. 9, it was held, that in order to make a valid decree for the final settlement of an estate, every party entitled to distribution must be brought in some way before the court. When persons entitled

to distribution under a will, die before a settlement, it is necessary that their personal representatives should be before the court at the final decree. And this seems to be the law in cases of intestacy, although the deceased distributee died in infancy. [Miller v. Eastman, et al. at this term.] In the case at bar, it is distinctly shown, that Francis Reynolds, one of the distributees, was dead, and it is not pretended that administration was ever granted upon his estate, but the court proceeded as if his share passed to his brothers and sisters.

3. With the exception of contested wills, and one or two other cases unlike the present, the orphans' court has no power to impanel a jury to ascertain a disputed fact; unless there is a doubt in relation to it requiring a cross examination to elicit the truth. And in such case the necessity for impaneling a jury must appear by setting out the testimony in the record, so as to enable an appellate court to revise the order. Such was the decision of this court in this court in Willis' Adm'r v. Willis' Heirs, 9 Ala. Rep. 330. In the case before us the record does not disclose the facts, so as to show affirmatively that the issue was rightly submitted to a jury, and the case cited will not allow us to intend that this authority was exercised correctly.

4. If there was no conversion of the slave, but she was omitted from the inventory under an honest claim of right the administrators should not be charged with her value; but she should be brought into the distribution, and if necessary the court may have directed her sale. The consent of the administrators that the court should render a judgment in the form in which the jury returned a verdict, we do not understand to be a waiver of the irregularity of the proceeding. It amounts to nothing more than an agreement that the court may, in conformity to the verdict, declare that Sylva was the property of the intestate's estate, and that her value was that ascertained by the jury. But cannot be construed into an assent to be chargeable to the estate for her value, as so much cash, though the orphans' court seem to have proceeded upon this hypothesis.

If the administrators, in the performance of their duties, caused advertisements to be published in newspapers, the charges of printers should be paid by them from the assets of the estate, and upon the settlement of their accounts should be allowed by the orphans' court. The decree in distributing all the assets, and then adjudging that the administrators should pay the bill for advertising in newspapers, fixes a personal liability upon them, whatever may have been the intention of the court. Whether this error could be here corrected by abating from the distributive shares *pro rata*, we need not inquire, as it is abundantly shown, that the decree is in other respects erroneous. It results from what has been said, that the decree of the orphans' court must be reversed, and the cause remanded.

DOE EX DEM. FARMER'S HEIRS v. ESLAVA.

1. The legislative acts of 1803, 1816 and 1818, in respect to the keeping and translating of the Spanish records, makes duly authenticated copies of such records evidence, and dispenses with the production of the originals.
2. *Seemle*: An incomplete claim to land under Spanish authority, may be admitted as evidence for the purpose of showing that Spain had asserted a title to the premises in controversy, or for the purpose of laying a predicate, from which it may be presumed that the defendant and those under whom he claims, had been in possession for twenty-years, so as to give him a title by prescription; although the evidences of title had not been recorded as directed by the acts of Congress of 1805, 1806, 1807, 1812.
3. An ancient deed, that is, one *more than thirty years old*, having nothing suspicious about it, is presumed to be genuine, and if found in the proper custody is admissible evidence, when supported by proof of corresponding possession.
4. A petition addressed to the Spanish Governor of Louisiana, during the time the country was in the possession of Spain, asking the grant of a tract of land, and the order of the Governor thereon, was *prima facie* deposited, if not registered in a public office, and became a public archive of the

Province; consequently, a copy of such a document is admissible evidence.

5. As a general rule, the party claiming a benefit from a foreign law, must prove its existence; but when the laws of one State or nation are operative in another, this rule does not apply. The courts of this country will therefore judicially notice the laws of Spain, which regulated the conveyance of real property in Mobile and the country adjacent, when the territory was subject to the dominion of that nation; and under the influence of this principle, are bound to know what documentary evidence of title were records of the Province, so as to allow copies to be admitted as evidence.
6. Even if it be doubtful whether a conveyance of a house in Mobile during Spanish times, passed the interest of the grantor in the lot on which it was situated, yet if the grantee and those claiming under him have continued to occupy the premises, the conveyance will be sufficient to give color of title.
7. Under the act of Congress of 1822, which contemplates that tracts of land not located or their limits defined, if claimed under incomplete grants shall be surveyed in order to obtain from the United States the usual evidences of title, a survey certified in the hand writing of a deputy surveyor and recognized in a patent certificate, is admissible evidence, although it is not shown that the survey was made under a previous order for that purpose.
8. A certificate made by the register of a land office of the proper district, within the appropriate sphere of his duties, to enable the claimant of land to receive a patent, is admissible evidence upon proof of its genuineness.
9. F. claimed under a conveyance dated in 1798, and conveyed to O. in 1801; title was shown in F's grantor, commencing in 1788. There was no proof of possession adverse to F. or his vendor, and F. was in possession at the time of the sale by him in 1801: *Held*, that it might be intended by a jury that F's possession commenced in 1798, and *perhaps*, that his grantor occupied the land under the conveyance of 1788, so as to complete the bar of the statute of limitations when the vendee of O. was ousted more than twenty years after F's title commenced.
10. *Semle*: A person in possession of land cannot be put to his action, entry, or claim, nor barred by the statute of limitations; but to make a possession adverse it must be under claim of a right to occupy the premises.
11. To perfect the bar of the statute of limitations, the possession must be uninterrupted; yet the interruption of mere trespassers, if unknown, will not affect the possession; but if known and repeated without legal proceedings being instituted, it is said they become *legitimae interruptiones*, and are converted into adverse assertions of right, which if not promptly and effectually litigated, defeat the claim of rightful prescription. If, therefore, a testator is expelled by a proceeding for a *forcible entry and detainer*, &c., promptly instituted, the statute may not be impeded in its course; but

Doe ex dem. Farmer's Heirs v. Eslava.

if the possession was preceded by a peaceable entry under a claim of right, the statute will be arrested in its progress, though the party entered upon regains the possession by the successful prosecution of an action of ejectment or other similar proceeding.

12. When the statute of limitations has completed a bar, it gives to the party in whose favor it has run, a right of entry upon which he may prosecute ejectment, or if sued, defend himself.

13. The treaty of 1893, by which Great Britain retroceded to Spain the Floridas, &c., stipulates that "*British inhabitants* or others who may have been *subjects of the King of Great Britain* in the said provinces," may retire in full security, sell their estates, and remove their persons and effects without restraint; and prescribes a time within which the emigration of such persons shall take place, unless prolonged by a royal order of Spain. If, therefore, a person coming within either of these classes failed to dispose of his estate in land, or to obtain a confirmation of his right to enjoy it as provided by the treaty and consequent royal orders, but left the country and resided abroad, his claim is forfeited to Spain, and might be re-granted by Spanish authority during the period of its rightful dominion over the territory.

Appeal from the Circuit Court of Mobile.

THIS was an action of ejectment for the recovery of real estate, situated in the city of Mobile, and particularly described in the declaration. The defendant entered into the usual consent rule, and the cause was tried upon the plea of "not guilty," a verdict returned for the defendant, and judgment rendered accordingly. On the trial, the plaintiffs excepted to the ruling of the court. To make out their case, the plaintiffs gave in evidence "the French patent to Grondell, marked A. Proceedings from the land office on this claim, B. The report of the commissioners on this claim, C. The plaintiff then read the act of Congress of 1822, confirming this claim, and then read the patent, D. The plaintiffs then offered evidence to prove that they were the persons named in the patent, and in the depositions of Mrs. B...., Mrs. Chastang, and Mrs. Fisher," and here closed. This evidence, so far as it is written, or documentary, accompanies the bill of exceptions, and is marked as indicated by the above letters.

"The defendant then offered the concession to Fornerette,

in 1788; No. 1. Deed from Mrs. Fornerette to Fontinello, in 1798. 2 Deed from Fontinello to Orsono, in 1801. 3. Deed from Orsono to Eslava, in 1802. 4." The plaintiffs objected to papers numbered 1, 2, 3, on the ground that they had never been presented to the board of commissioners; and further, were mere copies from the books of Spanish records, and the originals were not accounted for. To No. 4, the plaintiffs objected, because the paper offered was a certified copy from the land office, and did not purport to convey any title to the premises. *The conveyance signed by Orsono was produced*, the objections overruled, and the evidence admitted.

The defendant then offered a survey, purporting to be made by Dinsmore, marked No. 5, and also offered what purported to be a patent certificate, founded on this survey, marked No. 6. To the admission of the first the plaintiff objected, because no warrant or order of survey was shown, nor any confirmation authorizing the same; to the latter it was objected that it was not sufficiently authenticated, although it was proved that the signatures to Nos. 5 and 6 were genuine, and that the officers were, at the dates thereof, such as their signatures import, but the objections were overruled, and the evidence allowed to go to the jury.

A report from the land office favorable to the defendant's claim, marked No. 7, was next offered by him. This claim is found in American State Papers, Public Lands, vol. 3. The act of Congress of 1822, confirming it, as also the act of 1819, were read to the jury.

Evidence was adduced that Fontinello had been in possession of the lot, inclosed and sold it to Orsono, who built a house thereupon. It was also proved, that Eslava, the defendant's father, had received the rents for the lot during the Spanish times, from about the time the deed to him bears date—that he then claimed the property, and it was considered his: *Further*, that the United States, after the change of flags had paid him rent for the use made of it by *Gen'l Wilkinson*, and that it was in his possession either personally or by his tenants up to 1819. In the latter part of that year, De Vobiscey entered, and Eslava brought a *forcible entry and detainer*, recovered the possession, and retained it

until 1821, when the judgment in that proceeding was reversed, and a writ of restitution awarded. Afterwards, Eslava instituted another suit for the *forcible entry and detainer*, recovered the possession in 1822, and retained it up to 1826, when this judgment was also reversed, and a writ of restitution awarded. Thomas L. Hallett entered under De Vobiscey's title, and on the same day the defendant and others, as the heirs of Eslava, brought an action of trespass to try titles—they recovered the possession with damages, and under the judgment of the supreme court a writ of possession was executed.

The plaintiff then offered evidence to show, that one De Vobiscey, who had married an heir of Farmer, in the year 1818, or 1819, took possession of the premises peaceably in the assertion of Farmer's title, and from that time to the present, the claim has been before the courts of Alabama, as will be seen from 2 Stewart's Rep. 115; 3 Stewart & Porter's Rep. 105; and 7 Alabama Rep. 543.] To rebut this possession, the defendant produced to the court certified copies of the proceeding against De Vobiscey, marked 8, to show its character, and that he was turned out of possession.

The evidence shows that the heirs of Robert Farmer left this country, and during the time Mobile was held by the government of Spain, and until the return of De Vobiscey, none were known or heard of in the province of West Florida, as claimant of the land in question. It was also proved, that Orsono, at the time of the deed to him, and from him to Eslava, was the Spanish commandant at Mobile.

The court charged the jury—1. That they were not to regard the title from the United States to either party—each being alike confirmed, the confirmations balanced each other; and they must consequently look to the other evidence of title. 2. If they believed that the defendant and those under whom he claimed, had been in possession more than twenty years before the suit was brought under claim of title, it would be sufficient for his defence, and the conveyances produced might serve to connect the different possessions. 3. The conveyance to Mrs. Fornerette, if no adverse or other possession appeared, and no reason to the contrary was shown, and her vendee had been in possession, was a fact

which warranted the inference, if they thought proper to make it, that she was in possession under the concession. 4. If they believed the plaintiffs had been out of possession since the death of Farmer, and until the year 1819, that although De Vobiscey then entered, yet if he was dispossessed by the defendant by a recovery at law with damages, his entry was that of a trespasser, and his possession would not prevent the statute of limitations from running during its continuance—Eslava being restored by a competent tribunal.

The plaintiffs counsel then prayed the court to charge the jury as follows: 1. In this state a grant could not be presumed in favor of a direct adverse possession short of thirty years. 2. That the title of the defendant before confirmation was a mere equity, and not of that character of color of title which would support an adverse possession. 3. To sustain the defence under the statute of limitations, there must be twenty years actual, uninterrupted adverse possession, and this possession must be clearly defined—which charge was given, with the addition that the jury might infer the possession, if they thought proper, from the transmission of title from Fornerette to Fontinello, and from Fontinello to Orsono, and to the defendant. 4. That the concession to Mrs. Fornerette, her deed to Fontinello, and his deed to Orsono, cannot be received by the jury as evidence of title, so as to connect the defendant's title, under his confirmation, with them, nor could they be received by them as evidences of sales, nor as proof of the consideration, nor as proof as to the boundaries claimed. 5. If they find that De Vobiscey entered upon the premises in 1818 or 1819, with intent to claim, and did claim in right of his wife, as one of the heirs of Farmer, and held possession under that title during the time he was successful in litigation, that this interrupted the possession; and in order to sustain a title under the statute, there must be proof of a clear adverse possession of twenty years, prior to the time of the interruption. This charge was refused, and the jury were instructed that De Vobiscey was a trespasser. 6. That neither, under the claim of Mrs. Fornerette, nor under the act of Congress, can the defendant claim more than sixty feet front; and that the survey produced by him

cannot control these. 7. That if the defendant has put in a plea for eighty-four feet, and shows title for but sixty feet without designating its precise location, the plaintiff must recover—that the paper title produced by the plaintiff is superior to the paper title produced by the defendant. 8. That the act of 1822 confirming defendant's title, relates back only to the title as presented to the commissioners, to wit, the deed from Orsono, in 1808; while the same act confirms the title of the plaintiffs, which relates back to the patent of 1757. 9. That the legal construction of the bill of sale from Orsono to Eslava, gives to Eslava no right to the land in controversy. 10. That if the defendant claims under the title of Mrs. Fornerette, he cannot acquire by the statute of limitations more than the title calls for, which is sixty feet front. These several prayers were refused, except as above stated. To the charges given, and the refusals to charge, the plaintiffs excepted.

P. PHILLIPS and J. TEST, for the plaintiffs in error, insisted—1. The title of Grondell was a valid one, and was not forfeited, either by the conquest of Spain or by the treaty. The treaty merely provided that they might *emigrate in eighteen months*, and carry off their property—in fact, a forfeiture of the estate would have been a violation of the law of nations. [U. S. Land Laws, 13; Vat. L. of Nat. 388; Wheat. L. of N. 63; 8 Wheat. R. 589; 7 Pet. R. 86; 10 Id. 326; 12 Id. 412; 1 Ala. R. 672.]

2. The defendant claims under the Spanish government, and his title never having been recorded as the act of Congress requires, was inadmissible as evidence. [3 Stewt. & P. Rep. 122; 12 Wheat. Rep. 543; 3 How. Rep. U. S. 54.]

3. De Vobiscey's entry under a claim of title, as one of Farmer's heirs, interrupted the running of the statute of limitations—the intent with which he entered ascertained the character of his entry. [5 Stew. & P. 240; 13 Johns. Rep. 229; 11 Pet. Rep. 52.]

4. A grant will not be presumed from any length of time short of the statute of limitations, which in this State is thirty years. [1 Greenl. Ev. 21; 2 Conn. Rep. 607, 628; 4 Pick. Rep. 245.] Color and claim of title to support an ad-

verse possession, must be color of a legal title, and not a mere equity. [Adams on Eject. 469.]

5. Until confirmation, the defendant had no title which could have been given in evidence against the plaintiffs. [7 Ala. R. 903 ; 2 How. Rep. 375 ; 3 Id. 787.] The titles of plaintiff and defendant were simultaneously confirmed, and if they operate by way of confirmation, the plaintiff has the superior right. The confirmation of the defendant being for a quantity unknown, the act of Congress regulates the quantity, and acts upon the evidence furnished by the commissioner. [1 Ala. R. 660.]

6. The jury may find a general verdict for the plaintiff, though the defendant may produce a patent of an older date, for a part of the land, without designating what part. [4 Bibb's R. 285.]

J. A. CAMPBELL, for the defendant in error. The verdict finds, that Eslava, under certain papers produced by him, has held possession of the lot in controversy for more than twenty years. It is objected by the plaintiffs that these papers should not have been admitted as evidence of the defendant's title ; that his possession has been interrupted, so that the statute of limitations did not complete a bar before the commencement of the suit. This is the substance of all the points raised on the bill of exceptions.

The act of 1812, declares, that no title paper not shown to the commissioner appointed under its authority, shall be received in evidence in any court of the United States, as against a title derived from the United States. Eslava, in his claim laid before the commissioner, set forth such evidence of his title as he then had, and declared that other evidence of an antecedent date had been lost by time or accident ; the commissioner was satisfied of the truth of his declaration, reported favorably on his claim, the government abandoned its title, and left Eslava and other claimants to litigate their respective rights in the courts, upon the Spanish titles, and the confirmation of the United States. After Congress sanctioned the claim, and recognised the fact of loss, the act of 1812 ceased to be operative as it respected the proof it required to be laid before the commissioner.

The act of 1812 applies to claims which were not recognized or confirmed, but never was intended to stigmatize title papers which a party could not produce, yet was able to supply by parol evidence, or presumptions from facts *in pais*. Congress recognized the claim of Eslava as complete, founded upon a grant lost by time or accident, and confirmed it against any claim derived from the United States. This being the case, it was never intended to take from him the right of defending his claim by any evidence he might be able to produce. The report of the commissioner, and the confirmation of it by congress, is an acknowledgment of the validity of the evidence in favor of the title—leaving its interpretation and influence to be adjusted by the courts, when an adverse claimant shall assert a right. Such was the decision of this court when the present case was here at a previous term. [7 Ala. R. 543.] The papers then, it is concluded, were all admissible evidence—they were however not material to the solution of the question of title, as the plaintiff's title is inferior to the defendant's, unsupported by the papers taken from the Spanish archives. Farmer died in a house on the lot in question—certainly previous to the conquest of Mobile in 1780, as the house in which he died was destroyed in the assault on the town. His family left the country, and did not return. The construction of the British treaty with Spain, in 1783, has uniformly been held to involve a forfeiture of all the rights of the British settlers, after eighteen months from its date—a longer period was granted by Galvez, and the rigor of the law still further modified by royal order. [2 White's Recop. 307.] Those who did not sell their lands, and who did not remain in the territory, under that order, received no favor. [2 Clark's L. Laws, 269.]

The title of Farmer's heirs was extinct during the existence of the Spanish government—the acts of that government, and the persons who claim under it, indicate the state of the property, and the recitals in the papers they executed, are evidence of the facts, on the principle, that after such a lapse of time, no other evidence can be produced. [1 Greenl. Ev. 166.] In favor of long continued possession a grant will be presumed, or whatever is essential to support the title.

De Vobiscey's entry in 1819, was without title, the con-

firmation by Congress, if it gave color of claim, did not occur until 1822. Did this entry amount to a legal interruption of Eslava's possession? His recovery in ejectment is evidence of a right to the possession, and conclusively establishes his right to all the profits he has lost by the disturbance. This being the case, the plaintiffs can acquire no advantage by De Vobiscy's entry. [11 Wheat. Rep. 280; 2 Dev. & B. Rep. 204; 2 Johns. R. 369; 11 Id. 401; 5 Pet. R. 151; 7 Ham. Rep. 146; 9 Cow. Rep. 232.] The continuity of Eslava's possession is preserved by his recovery in ejectment.

According to the civil law, possession prolonged during the period that the law defines, will result in a prescription, if it fulfill these six conditions, viz:—1. Continuous. 2. Uninterrupted. 3. Peaceable. 4. Public. 5. Unequivocal. 6. *A titre de proprietarie*. Unless all these concur there is no prescription. [Troplong de la pres. 336.] The civil law writers maintain that where one is entered upon and tortiously evicted, and afterwards recovers the possession, he may refer it to the title under which he previously occupied, and thus connect his present and past possession, without allowing the intermediate occupancy of the trespasser to operate a disturbance. [Troplong de la pres. 448; Dunon troile des pres. 20; 41 Book of Dig. tit. Pres. § 13.]

De Vobiscy's entry has been effaced by the recovery of possession with mesne profits by Eslava—the judgment of the court in favor of the latter affirms that the entry was a trespass—that the trespasser shall derive no benefit from it, but shall make restoration, so as fully to indemnify the party aggrieved. The intrusion then cannot be held to have interrupted the defendants possession, and prevent him from availing himself of the time he previously occupied, to complete the bar of the statute of limitations.

COLLIER, C. J.—The objections of the plaintiff to the documentary proof of the defendant, was rightly overruled. By the act of 1803, the Governor was required to appoint and commission some person to keep, translate and preserve the records of the office of clerks and recorders which were kept

during the administration of the Spanish government, with authority to make and certify copies of the same under his official hand and seal. [Toulm. Dig. 239, § 23.] The act of 1816 provides, that the keeper and translator of these records shall cause them to be transcribed in books, &c.; that copies shall be given and inspection of them allowed, as of other records, and that copies duly certified shall be received and read in evidence in the same manner and with like effect, as other certified copies of records, &c. [Toulm. Dig. 695, 696, § 1, 4.] By the act of 1818, the governor of the Alabama territory was authorized to appoint and commission a keeper and translator of the Spanish records, &c. who should keep his office at Mobile. [Toulm. Dig. 696, 697, § 1, 2.] These several enactments made documents number 1, 2 and 3, admissible, unless there was an objection to their competency, other than that they were copies, and the absence of the original was not accounted for. The statutes we have cited all related to the same subject matter, and must be construed together, and when thus looked to, it is perfectly clear that they make the copies of the original Spanish records evidence, when duly authenticated by the keeper and translator. To the form of the authentication no objection has been made.

It may be conceded that documents number 1, 2 and 3, are at best, evidence of an imperfect title, and to entitle them to the dignity of evidence "against *any grant* derived from the United States," should have been recorded as directed by the acts of Congress of 1805, 1806, 1807 and 1812. [3 Stewt. & P. Rep. 105; 3 How. Rep. 32.] But the question arises whether these papers are not admissible for the purpose of showing that Spain asserted a right to the premises in question, or laying a predicate from which it may be presumed that the defendant and those under whom he claims had been in possession of the premises in question for twenty years previous to the institution of this suit, so as to give him a title by prescription. Our predecessors, in *Hallett v. Eslava's Heirs*, 3 Stewt. 1 P. R. 122, intimated that the evidences of an incomplete claim under Spanish authority should be received for the purpose indicated, though they had not been recorded as the statutes referred to contem-

plate. It is clear their admission is not inhibited by the letter of the acts of Congress, as they do not deny the validity of the confirmation and patent consequent upon it; but the defence which they intended to aid, concedes to the plaintiff's title the validity which the confirmation and patent can, under the circumstances impart. The statute of limitations, of which the defendant seeks to avail himself, merely addresses itself to the remedy, and insists that the plaintiff has slumbered on his rights until they have become too stale to be enforced.

Ancient documents, it is said, are allowed to support ancient possession, though these documents are not proved to be part of any *res gesta*. They are admitted in such cases, as forming a part of every legal transfer of title and possession by act of the parties; and there is also some presumption against their fabrication, where they refer to co-existing subjects by which their truth may be examined. On this ground, therefore, as well as because such is generally the only attainable evidence of ancient possession, this proof is admitted. The value of these documents, it is said, depends mainly on their having been contemporaneous with the act of transfer, if not part of it; care is *first* taken to *ascertain their genuineness*; and this is shown *prima facie* by proof that the document comes from the *proper custody*, or by otherwise accounting for it. It is not necessary that they should be found in the best and most proper place of deposit. There can only be one such place, but there may be many that are reasonable and probable, though differing in degree. In respect to these latter, the proposition to be determined is, whether the actual custody is so reasonably and probably accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine.

It is also requisite, where the nature of the case will admit it, that proof be given of *some act done* in reference to the documents offered in evidence, as a further assurance of their genuineness, and of the claiming of title under them. Where the document bears date *ante litem motam*, and the transaction is so ancient that proof of contemporaneous acting, such as possession or the like, is not probably to be obtained, its production is not required. But where unexceptionable evi-

dence of enjoyment referable to the document may reasonably be expected to be found, it must be produced; but if such evidence is not to be expected, still it is necessary to prove some acts of modern enjoyment with reference to similar documents, or that modern possession or use should be shown, corroborative of the ancient documents.

Under these qualifications, *ancient documents* purporting to be a *part of the transactions* to which they relate, and not a mere narrative of them, are received as evidence that these transactions actually occurred. An ancient deed, that is, one *more than thirty years old*, having nothing suspicious about it, is presumed to be genuine without express proof; and if it is found in the proper custody, and corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it is presumed that the deed constituted part of the transfer of property therein mentioned; because this is the usual and ordinary course of such transactions among men. The residue of the transaction may be unerringly inferred from the existence of genuine ancient documents. [1 Greenl. Ev. 166 to 169, and citations in notes.]

In *Jackson v. Laroway*, 3 Johns. Cas. 283, Kent, J. held that an ancient deed was not admissible without proof of its execution, unless evidence was adduced to show that possession had gone along with it; but the other judges maintained a different doctrine. And in *Doe v. Passingham*, 2 Carr. & P. Rep. 440, it was said to be no objection to the admissibility of a will more than thirty years old, that possession has not followed it; the court must first be made acquainted with it by its admission as evidence, before it can be known how the possession should go. At the present day, the weight of authority is decidedly against the opinion of Judge Kent, and establishes, that if proof of possession cannot be had, the deed may be read, if its genuineness is satisfactorily established by other circumstances. [See 9 Ves. Rep. 5; 4 Term Rep. 707, (n. b), and 709, (n. †); 1 Phil. Ev. 477; 3 Id. 1310, C. & H's Notes.]

In the case at bar, the documents objected to, come from a depository where they should probably and reasonably, (at least), have been looked for. The possession of Fontenello

was proved previous to, or about the time the deed from himself to Orsono bears date; and if the papers can be regarded as originals, they are sufficiently authenticated to warrant their admission as evidence.

The petition of Fornerette to the governor of Louisiana, and his order thereon, were *prima facie* deposited, if not registered in a public office and became a part of the public archives of the province. This was quite sufficient to make the copy evidence. As it respects the deeds from Fornerette to Fontinello, and from the latter to Orsono, it is recited in the body of each that the respective grantors signed the same, and the transactions were attested before the commandant at Mobile, and two witnesses of assistance, for want of a notary public. If it be allowable judicially to notice the Spanish law, there can be but little doubt but these papers, as found in the archives, are originals, known as public acts, carrying on their face, faith and credit, and making full proof in the tribunals of Spain. [See *Los Caygas v. Larionda's Syndics*, 4 Mart. Rep. 283; *Mauri v. Heffernan*, 13 Johns. Rep. 58.] As a general rule, it is true that a party claiming a benefit from a foreign law, or the law of a sister State of the Union, must prove its existence; but when the laws of one state or nation are operative in another, the rule it is apprehended does not apply. It was accordingly held, that, where lands lying in Indiana were subject to the legislation of Virginia for certain purposes, it was competent for the courts of the former state to take judicial notice of the Virginia laws in respect to such lands, though they were not specially proved. [*Henthorn v. Doe*, 1 Blackf. Rep. 157, 164.] The laws of Spain were operative at Mobile when the several conveyances referred to were made, and by them, these conveyances were regulated; although our laws furnish the rule by which the transactions of parties are directed since the United States took possession of the country, yet we are bound to know, in the absence of all testimony, what were the laws previously applicable to conveyances of land situated within it. From this view, it results that documents number 2 and 3, are copies from the original records, and are admissible evidence as well upon principle as authority.

We understand from the bill of exceptions, that the conveyance from Orsono to Eslava was produced at the trial—after (we suppose) the objection was made to the certified copies. But if the original had not been produced, it perhaps might be questioned whether a certified copy would not be admissible, as the original had been laid before the commissioner appointed to examine such claim, and recorded by him? We will not stop to inquire whether this conveyance embraces as well the lot as the house, though perhaps when all its terms are considered, it will be found that they are sufficiently comprehensive to embrace the entire premises. But be this as it may, it will suffice to show that the defendant and his ancestor held under color of title.

It was not indispensable to the admission of the survey by Dinsmore, to show that an order for that purpose was made. The act of 1822 contemplated that the tracts of land which were not located, nor their limits defined, if claimed under incomplete grants, should be surveyed in order to obtain from the United States the usual evidences of title. This was sufficient to make it evidence, when taken in connection with the fact that Dinsmore was a deputy surveyor, that the survey, as certified, was in his hand-writing, and was recognized by the patent certificate.

The certificate made by the register was an act within the appropriate sphere of his duties, to enable the defendant to receive a patent, and its genuineness being proved, was properly admitted.

In the absence of any proof of an adverse possession, we incline to think a jury would be warranted in inferring from the fact of Fontinello's possession about the time of the sale by him to Orsono, that that possession commenced as early as 1798, when the conveyance from Fornerette to himself was made. Nor are we sure that the presumption might not be indulged consistently with reason and law, that Madam Fornerette was in possession under the concession to her made in 1788. But if a jury would infer the possession of Fontinello, this would be quite sufficient to complete the bar of the statute of limitations, if the ouster by De Vobiscey did not occur until after the 14th of June, 1818.

An uninterrupted adverse possession for twenty years, not

only gives a right of possession which cannot be divested by entry, but also gives a right of entry. So that if a person who has such a possession is turned out of it, he may lawfully enter and bring an ejectment for its recovery; upon which he will be entitled to judgment. Such a possession forms a prescriptive bar. [1 Ld. Raym. Rep. 741; 2 Salk. Rep. 421, 685; 2 Hen. & M. Rep. 318; 5 Sergt. & R. Rep. 240.] To constitute an adverse possession, there must be a claim of title. A possession, unless accompanied by such claim, will not be considered adverse, and will not constitute a bar to those having the real title. [Co. Lit. 153; Runn. Ejectm. 9; 2 Prest. Abs. 388; 9 Johns. Rep. 180; 5 B. & Ald. Rep. 232; 3 B. & Adol. Rep. 738; 9 Wheat. Rep. 241.] A person in possession cannot be put to his action, entry or claim, nor can he be barred by the statute of limitations. [2 Prest. Abs. 357; 9 Co. Rep. 106 a; 5 Leigh's Rep. 691, by *Carr, J.*]

In respect to prescription at common law, it is said that to consummate it, it must have been uninterrupted and peaceable, yet the interruption of mere trespassers, if they were unknown, will not affect the possession. But if they were known, and the trespasses have been repeated without legal proceedings being instituted, they then become what *Bracton* has called *legitimæ interruptiones*, and are converted into adverse assertions of right; and if not promptly and effectually litigated, they defeat the claim of rightful prescription: and a mere threat of action for the trespasses without following it up, will not have the effect to preserve the right. [Knapp's Rep. 60, 70; 1 Chitty's Prac. 284, 757.]

In *Innis v. Miller, et al.* 10 Mart. Rep. 289, it was held, that to entitle the possessor of property to unite the possession of his predecessor to his own, that of the latter must have been, *first*, in good faith and under color of title; *secondly*, it must have been continued, and without interruption; *thirdly*, it must be that, which the possessor had at the time it was delivered to him. Prescription, it is said, is not interrupted by filing a petition, which is the initiatory step in a suit, according to the practice in Louisiana; but by its service, [6 Mart. Rep. N. S. 129]; so it was interrupted by an

action in which the plaintiff was non-suited. [2 Mart. Rep. N. S. 582.]

Possession may be adverse without written evidence of title; for without it there may be an ouster, either by disseizin, abatement, intrusion or deforcement. [2 A. K. Marsh. Rep. 18.] Every possession, it is said, is presumed to be in subordination to the title of the true owner, [12 Johns. R. 365; 1 Paine's R. 457]; and the question of adverse possession is to be determined by the jury; under the instructions of the court. [9 Johns. R. 101.]

The entry by De Vobiscey, it must be intended from the facts recited in the record, was made under an assertion of right and color of claim, as an heir in right of his wife, of Robert Farmer, deceased. This entry, it is said, was peaceable, and effected an ouster of defendant, or his father, under whom he claims. If the possession had been recovered in a proceeding for a *forcible entry and detainer*, or by an *unlawful detainer*, promptly instituted, it might not have interrupted the continuity of possession; but it appears from the proof that defendant was twice unsuccessful in the prosecution of the former, and then resorted to an action of trespass to try titles. In this form of action the title was doubtless controverted, and a recovery could not have been upon proof that the defendant's entry was as a mere trespass. The verdict and judgment must have been obtained upon evidence of superior title resting upon documentary proof, or previous possession. Now, although the defendant must be taken to have shown the better right to the premises, yet we incline to think that the peaceable entry, and consequent occupancy of De Vobiscey under an adverse claim of title was sufficient to interrupt the possession, and arrest the operation of the statute of limitations, if it had not previously completed a bar. If however the statute had run previous to the ouster by De Vobiscey, it gave to the defendant a right of entry upon which he might prosecute ejectment, or if sued, defend himself.

When this cause was here at a previous term, [7 Ala. Rep. 543] we held that the simultaneous confirmation by Congress of the claims of the respective parties, operated only as a quit claim or relinquishment by the United States of the

title of the government, and left them to adjust by suit or otherwise, the question of superiority of title, as resting upon independent evidence. [See also Hooter v. Tippet, 8 Mart. Rep. 637.]

In this view of the case the first inquiry is, has the plaintiff shown such a legal title as would support a verdict in his favor. The French patent to Grondell is not a part of the transcript before us; but as it is not objected to, as being insufficient to convey the title at the time it bears date, we will suppose it to be unobjectionable in point of form. It appears from the proof, that Farmer occupied a house on the premises in controversy, that this house was burnt by the British or Spaniards, when the latter took possession of Mobile about 1780, that Farmer died in Mobile, that his family after having removed to a place on the Tensaw, left the country; "and during the Spanish times, and until the return of the DeVobiscey, were never known or heard of, in the Province of West Florida, as claimants of this lot."

In 1762, Louisiana was ceded by the King of France to the King of Spain, [2 White's New Recopilacion, 529 to 532;] and by a treaty of the following year between his Britanic Majesty, the King of France, and the King of Spain, Florida, with the country east of the Mississippi river, excepting the town of New-Orleans and the Island on which it is situated, were ceded to his Britanic majesty. [Id. 291, 292, 533, top page.]

In 1783, the country last mentioned, was retroceded by Great Britain to Spain by treaty, the fifth article of which is as follows: "His Catholic Majesty agrees, that the British inhabitants, *or others who may have been subjects of the King of Great Britain in the said provinces*, may retire in full security and liberty, when they shall think proper, and may sell their estates, and remove their effects as well as their persons, without being restrained in their *emigration*, under any pretence whatever, except on account of debts or criminal prosecutions; *the term limited for this emigration being fixed to the space of eighteen months, to be computed from the day of the exchange of the ratifications of the present treaty*; but if from the value of the possessions of English proprietors, they should not be able to dispose of them within the

sai dterm, then his Catholic Majesty shall grant them a prolongation, proportioned to that end." By a royal order dated in 1785, the time was prolonged four additional months. Another royal order was made in 1786, and communicated to the Captain General of both Florida's, by which the English and American families established at Baton Rouge, Mobile, Pensacola and Natchez, were permitted to go from the provinces agreeably to the treaty. These families were, however, permitted to continue to dwell "where they are established, on the condition, that for the present, and as indispensable circumstances they take a solemn oath of fidelity and obedience to his Majesty, and that they go not out of the limits where they are actually situated, without the power of going to other parts, not having an express license of the government." [2 White's New Recop. 306, 307.]

The law organizing the board of commissioners under the Florida treaty, directed them to examine and determine, "agreeably to the laws and ordinances heretofore existing of the governments making the grants respectively," the validity of claims submitted for adjudication. In the investigation of British claims, the attention of the commissioners was specially directed to two objects. 1. How far were they valid by the law of nations. 2. How far were they considered valid under the Spanish government; and if satisfied of their validity and correctness to confirm them. The commissioners submitted an elaborate report on British claims. Their exposition so far as material to the present case may be thus condensed. They first address themselves to the argument that these titles are valid by the law of nations, and show that the *jus postliminium*, as laid down by writers on that branch of the law, only applies, where persons and things taken by the enemy comes again into the power of the nation to which they belonged, either by conquest, or treaty stipulation; that Mobile and the adjacent country was wrested from Great Britain by conquest, and upon peace being made, yielded up to Spain; consequently, there was no restoration of territory, so as to make this principle of national law applicable. "*Whatever is ceded to the enemy by a treaty of peace, is truly and completely alienated. It has no longer any claim to the right of postliminium, unless the treaty*

of peace be broken or cancelled. It might be said in general, that *the right of postliminium no longer exists after the conclusion of the peace. That right entirely relates to a state of war.*" Further, American citizens can occupy no better ground than the subjects of Great Britain. The treaty of '83 recognized claims and provided for their disposition, by the subjects of that nation who were inclined to emigrate. The validity of the fifth article of the treaty is considered unquestionable, and necessary to avoid the influence of that principle of public law, which declares that "immoveable possessions; lands, towns, provinces, &c., become the property of the enemy who makes himself master of them; *but it is only by the treaty of peace, or the entire submission and extinction of the state* to which these towns and provinces belong, that the acquisition is completed, and the property becomes stable and perfect." This article embraces not only "British inhabitants," but subjects of the King of Great Britain in the provinces—it is to be considered like a stipulation in any other contract, and if it has not been complied with, the parties interested must submit to the penalty as a consequence of the failure to avail themselves of its provisions.

"Every State," says Vattel, "has the liberty of granting or refusing to foreigners the power of possessing lands or immoveable property, within her territory. If the sovereign does not permit aliens to possess immoveable property, nobody has a right to complain of such a prohibition; for he may have good reason for acting in this manner; and as foreigners cannot claim any right in his territories, they ought not to take amiss that he makes use of his power and of his right, in the manner which he thinks most for the advantage of the State." "The necessity of making peace authorises the sovereign to dispose of the property of individuals; and the eminent domain gives him a right to do it." [B. 2, C. 8, § 114; B. 4, C. 2, § 12.] These citations were considered decisive of the authority of Great Britain and Spain to stipulate as they did by the fifth article of the treaty. A similar provision it is said, is contained in the treaty of 1763.

The commissioners state that after the expiration of the term within which the British claimants were to dispose of

their property, Great Britain made them compensation, acknowledging thereby that she had no complaints or demands against the King of Spain. And Spain previous to the cession of the country to the United States, considered a British claim as void, where the claimant failed to dispose of it as provided by the treaty, or did not himself remain in the province upon taking the oath of fidelity. That the United States in virtue of treaty stipulations, is entitled to all the rights and immunities of Spain in respect to the land within the ceded territory, and if Congress were to recognize claims which are void or voidable, the act would be a mere munificence, and not the result of legal obligation. There is nothing in the treaty with France in 1803, or in that with Spain in 1819, which imposes upon the United States the duty of recognizing grants emanating from France or Great Britain, which were annulled by the operation of the treaty of 1783. [2 White's New Recop. 296 to 303.]

What the commissioners say of British claims is shown by them to be applicable to grants from France or its local authorities in the Province of Louisiana, previous to 1762. It is affirmed that the treaty of 1763, contains a provision similar to the fifth article of the treaty of 1783, but if it did not, the latter is sufficiently comprehensive to embrace the title under which the plaintiff is seeking to recover. If Robert Farmer was not a "British inhabitant," he certainly was a "subject of the King of Great Britain," and no matter to which category we assign him, he is included by the article.

It is not pretended that the ancestor of the plaintiff's lessors, or his heirs, made a disposition of the estate in controversy, as provided for by the terms of the treaty, or that either, or any of them took an oath of fidelity and obedience, so as to authorise them to remain in the province. It is by no means certain that Robert Farmer did not die in Mobile *while it was in possession of Great Britain*. But however this may be, it is certain that he died there, and after the peace of '83, his family left the country, and did not return again until 1818 or 1819. The title then under the French patent to Grondell became inoperative in virtue of the treaty, and if it was necessary for the government of Spain, to claim the forfeiture, this was done by the concession to Fornerette.

But we incline to think that no act was necessary, and the title vested in Spain by the failure of Farmer or his heirs to avail themselves of the provisions of the treaty.

This view indicates that the title under which the plaintiff claims does not give a legal right to the premises in question, and that his lessors are not entitled to recover, although no opposing evidence had been offered by the defendant. It is not necessary then to decide, whether the law was correctly ruled by the court below; for however this may be, the plaintiff, as the jury should have found a verdict against him, cannot have been prejudiced. We have but to add that the judgment of the circuit court is affirmed.

ELDRIDGE AND ANOTHER V. TURNER, BY HIS NEXT
FRIEND, &c.

1. Where one person proposes to sell property to another, and as an inducement to purchase, offers to take the vendee's note for the price, *payable to the vendor for the use and benefit of an infant son of vendee*, and to hold the money for the *cestui que trust*; if the vendee accedes to the offer and gives a note in the form proposed, the contract will be obligatory upon the parties, and the payee will be regarded as a trustee for the son.
2. The indorsement of a note which, upon its face is payable to one person for the use of another, cannot impart to the indorsee a right to receive the money due thereon, for his own benefit; but the indorsement is a breach of trust on the part of the payee, which entitles the *cestui que trust* to assert his right to the proceeds of the note, in a court of equity.
3. E., as the indorsee of C., of a note payable to the latter for the use of another person, recovered a judgment against F. in Talladega, the *cestui que trust* filed a bill in another chancery district, asserting his right to the money, praying that a collection of the judgment be enjoined, and that the defendant therein be a trustee for the complainant of the amount due and to become due thereon: *Held*, that it was competent for the complainant to have instituted his suit in any district in which T. resided, and that an objection by E. and C. alone, that the bill should have been filed in Talladega is not available.

4. Where the testimony supports the allegations of a bill *substantially*, this is all that is required; and relief will not be denied, because there is a discrepancy between the case as alledged and that proved in some unimportant particular.
5. Where the complainant alledged, that a note payable *in totidem verbis* to C. for his use, made under a contract between C. and T., by which C. was to receive the money for the complainant's benefit, and C. denied the allegation, the denial will be overbalanced by the production of the note and the positive testimony of one witness supporting the bill.
6. If an objection that the deposition of one of the defendants who was examined at the complainant's instance, was not taken under an order for that purpose, is not made in the primary court, it will not be entertained on error.
7. Where one of the objects of a bill is to enjoin a judgment recovered by the indorsee of a note, the indorsee is a necessary party, and if he die pending the suit, it should be revived against his personal representative.

Writ of Error to the Court of Chancery sitting in Benton.

THE defendant in error filed his bill against John M. Eldridge, Henry B. Turner and James W. Camp, in which a case is stated substantially as follows: About the third day of November, 1840, the defendant, Turner, executed a note by which he promised to pay to the defendant, Camp, for the benefit of the complainant, the sum of five hundred dollars for value received, which was accepted and received by the payee for the use expressed upon its face. At the February term of the county court of Talladega, holden in 1844, a judgment was rendered on this note at the suit of the defendant, Eldridge, its indorsee, against the maker—which was affirmed by the supreme court on error.

The circumstances under which the note was executed were these: the defendants, Camp and Turner, and one Bradford were the owners, in equal shares, of a stallion; called "Whale Bone"—then in possession of Camp, altogether profitless. Camp proposed to Turner, that if he would make the note, he should have his (C's) interest in the stallion, and that the latter would hold and keep the note for the use and benefit of the complainant, until he (complainant) should attain the age of twenty one years, and then it should be de-

livered over to him ; which agreement and undertaking, on the part of the payee, was the sole inducement of his co-defendant, Turner, to make the note.

Camp delivered the stallion to the defendant, Turner, who is the complainant's father, and the latter, willing to participate in the liberality of Camp, gave the note for more than his interest in the horse was worth.

Eldridge became the proprietor of the note with a knowledge of the complainant's interest therein, but notwithstanding this, is endeavoring to coerce a collection of his judgment—claiming the same for his own benefit.

Complainant is apprehensive if the judgment should be satisfied, and pass into the hands of Camp or Eldridge, he will have great difficulty in recovering the same, even if he ever should succeed. He has confidence in the continued solvency of his father, and would therefore prefer that the amount of the judgment should remain in his hands, as a trustee for complainant.

The bill prays an injunction to restrain the collection of all the judgment but the costs ; that the defendant therein be a trustee for the complainant in respect to the amount due and to become due on the judgment ; and that such other relief as may be proper be granted. An injunction was granted accordingly.

Eldridge, in his answer, admits the recovery of the judgment in his favor, as alledged in the bill, affirms that the note was indorsed to him fairly, and *bona fide* by the payee—avows his belief in the answer of his co-defendant Camp, and insists that the complainant may be required to make out his case by strict proof.

Camp denies that he ever proposed to make a gift to the complainant, except in the following manner. At the time the note was made, the maker thereof and himself had a settlement of their accounts, in which the latter fell in his debt \$333 33 ; thereupon, this defendant being anxious to dispose of his interest in the stallion, he proposed to Turner, the maker of the note, that if he would purchase defendant's interest, being one-third, at the price of \$166 66, he, defendant, would make a present of that sum to the complainant, who

was then lying at defendant's house, and had been for several years previously. This proposition was made upon the express condition, that Turner, the father, would make a deed of gift to his son, the complainant, of a male slave, named Douglass, about twelve or fourteen years of age; which condition it is believed, has not been complied with by the father. The several amounts stated above, constitute the consideration of the note, and of which only \$166 66, the price of the father's interest in the stallion, was promised to the complainant, and this upon the condition stated.

This defendant denies that he proposed to the maker of the note, that upon its being perfected by him, he would keep it for the complainant's benefit, until he should attain the age of twenty-one years, and then hand it over to him. He also states, that he paid for clothing and tuition of the complainant while he lived in his family, and upon other accounts, different sums of money, amounting in the aggregate to an amount perhaps equal to that of the note.

The defendant, Turner, admits the truth of all the allegations of the bill, and denies all fraud so far as it concerns himself. His deposition was taken at the complainant's instance; and he testifies that on the 3d day of November, 1840, he executed two notes to Camp; one on a settlement with him, which he believes was for \$570 75; this has been paid; the other was given as the price of "Whale Bone," for \$500, payable to Camp, for the benefit of the complainant. This note was given at Camp's house, in Madison, upon a desire expressed by him to do something for complainant, whom "he had partially raised," with the understanding and promise that he was to raise and make ample provision for him. Witness did not desire to purchase Camp's interest in the horse, and would not have given so much for it, but with the understanding that complainant was to have the benefit of the money to be paid; and the note thus expressed the witness' undertaking, because he refused to execute it in any other form.

Pending the suit Camp died, and leave was given to revive it against his representatives when known; but it does not appear from the record that they were ever brought in. It is stated in the order preceding the decree, that the parties

came by their solicitors, and that the cause was submitted for hearing upon the bill, answers, demurrer, and proof; whereupon it was insisted that the bill should be dismissed, because it was filed in a chancery district which did not embrace the county in which the judgment sought to be enjoined was rendered. This objection to the jurisdiction of the court was overruled, and the equity of the bill affirmed.

The chancellor was of opinion that Camp became a trustee for the complainant, as soon as the note was made and delivered to him; and that the difficulty of collecting the money from Camp or Eldridge, if the latter should collect the money on his judgment, were sufficient to invest the court of chancery with jurisdiction. Thereupon it was considered that the bill not being revived against the representatives of Camp, abate as to him; and it was ordered and adjudged that the injunction be perpetuated. It was further ordered that it be referred to the register to take an account of the amount due upon the judgment at law, and that he report thereon to the next term, as also whether the complainant has attained his majority.

W. P. CILTON, for the plaintiff in error. The note on which the judgment at law was recovered, was never delivered by Camp to complainant, so that the gift was never consummated. [3 Stew. Rep. 121; 1 Stewt. & P. Rep. 56; 1 Ala. Rep. 52; 2 Id. 117, 648, 669; 7 Id. 470; 4 Kent's Com. 438; 12 Ves. Rep. 39; 2 G. & John. Rep. 208; 11 Cond. Eng. Ch. Rep. 459.] The trust sought to be enforced is both *voluntary* and *executory*—chancery will not execute it, though a consideration moved from the complainant's father to Camp. [2 Ala. Rep. 83; 2 Story's Eq. 236.]

There is a variance between the contract evidenced by the note and that alledged in the bill, and there is neither *fraud* or *mistake* pretended in making the note payable "ten days after date." Besides this, the bill is prematurely filed, as it is not alledged that the complainant has attained his majority. [2 Ala. Rep. 571; 9 Id. 31; 7 Wend. R. 248.]

Camp was an indispensable party while living, and after

his death the bill should have been revived against his personal representative.

The judgment was recovered in the circuit court of Talladega—neither Camp nor Eldridge resided in Benton county; consequently the chancery court of the latter could not take jurisdiction of the cause. [8 Porter's Rep. 63; 8 Ala. Rep. 244; 9 Id. 351; Freeman v. McBroom, et al. at this term.] But if all these objections fail, then it is insisted that as the trust involved an isolated monied demand, recoverable at law, equity will not interfere. [8 Porter, 339; 9 Ala. R. 351.]

The answers of Camp and Eldridge deny the material allegations of the bill, and are opposed only by the testimony of the defendant in the judgment. This is not sufficient to overbalance them—the rule requires two witnesses, or one with strong corroborating circumstances.

Eldridge is a *bona fide* holder of the note for value—he did what the maker of the note should have done, viz: he paid it; and should be permitted to recover it. To show that a *voluntary* trust, to be executed *in futuro*, should not be enforced, he cited 2 Story's Eq. 16, 95, 96, 102, 236, 242, 257; 1 Ves. jr. Rep. 52; 6 Id. 656; 18 Id. 91; 3 Meriv. R. 249; 4 Johns. Ch. Rep. 498.

S. F. RICE, for the defendant in error, insisted, that the form of the note indicated a trust for the benefit of the complainant. [6 Ala. Rep. 821.] This being so, Eldridge is charged with a notice of the trust; and besides he failed to prove that he is an assignee for value. His answer upon this point being in avoidance, cannot avail him as evidence.

Camp could not use the trust fund to pay his own debt, or for his own private use, and Eldridge acquiring the note with notice stands in the same predicament. [1 Rob. Rep. (Va.) 107, and note, 112; 5 Rand. R. 195; 1 Hump. R. 210; 1 Mylne & R. Rep. 337.] Camp received the note under an agreement that he would appropriate the proceeds to the benefit of the complainant, and is bound to perform his agree-

ment, whether any pecuniary or other consideration passed to him, or not. [6 Ala. R. 600.]

The objection that the bill is filed in an improper county, cannot be sustained—it should have been made in the primary court as soon as an opportunity offered. But no matter when made, it could not have availed; for the bill is not merely to enjoin a judgment, but to dismiss a trustee and enforce a trust.

COLLIER, C. J.—We cannot think that the bill in this case is wanting in equity. The inducement of the maker of the note, it is alledged, was not only to obtain the payee's interest in the horse which they held as joint property, but to lend his aid in promoting the bounty in favor of his son. How far he may have been influenced by the one consideration, or the other, it is impossible to know, nor is it important to inquire; for it is distinctly affirmed, that his purpose in meeting the proposition of the payee was to secure the amount for which the note was given to the complainant. Conceding that Camp's interest in the horse was worth \$500, or even more, yet if he sold it under a stipulation with the purchaser, that he would take his note for that amount, agreeing upon its face that the money should be paid for the benefit of an infant son of the vendee, the vendor, by the acceptance of the note, and delivery of the horse, became a trustee for the son. The contract was consummated by these several acts, and became alike obligatory upon both parties—the vendee was bound to pay the money, unless he could show that the contract was invalid, irrespective of the question of consideration, (6 Ala. Rep. 600;) and the vendor would hold it in trust for the person for whose benefit the note purports to have been made. If, under such circumstances, the vendor could exempt himself from the performance of the trust, then he might successfully practice a fraud on the maker of the note, who but for the destination the money was to receive, never would have entered into the contract.

The indorsement of the note by the payee to Eldridge, though for a full consideration, cannot affect the rights of the beneficiary. Upon its face it purports to be an undertaking

to pay for the *use* of the complainant, (6 Ala. Rep. 821,) and of course informed the indorsee what was the character of the security he received.

Assuming the case made by the bill to be true, and the indorsement of the note was a breach of trust on the part of Camp, which authorized the *cestui que trust* to come in equity and assert his right to the money. To make that right effectual and as expeditious as might be, it was allowable to pray an injunction to restrain the indorsee in the enforcement of his judgment.

The object of the bill in this case is, to secure a trust fund in the hands of the defendant, Turner, and as secondary and ancillary to this object, a judgment against the holder of the fund is sought to be enjoined. It is unlike *Shrader v. Walker, et al.* 8 Ala. Rep. 244. There the complainant prayed an injunction upon the ground that the judgment was unequitable—being recovered upon a cause of action which should not be enforced. We held that the bill in such a case should be filed in the chancery court of the county where the judgment was recovered. It may be remarked that the necessary parties to the bill resided in counties other than that in which it was filed, but whether, if the fact had been otherwise, the result would have been different, no intimation was given. See *Freeman v. McBrown, et al.* at this term.

In the case at bar, we have seen that the primary object of the bill was not to enjoin a judgment, but to arrest a fund in the hands of a judgment debtor, so as to make it available to the party entitled to it. It is in effect a suit against him, and we think it was competent to have instituted it in any county in which he resided. True, the bill does not alledge where the defendant Turner lives, but he does not object that it is filed in a county which cannot take jurisdiction of the cause, and it is not for a mere accessorial party to ask its repudiation.

The testimony of the defendant Turner was taken at the complainant's instance, and establishes the allegations of the bill as to the purchase of Camp's interest in "Whale Bone," and making the note in question. True, the bill alleges that the payee was to keep the note for the use and benefit of the complainant, until he attained his majority, and then it

should be delivered to him ; while the witness merely proves that the money as indicated by the note was to be paid for the use and benefit of the complainant. This discrepancy between the allegation and proof is in our judgment unimportant. The material inquiry was, whether the complainant, in virtue of the contract between his father and Camp, was entitled to the proceeds of the note, and to this, the evidence is direct. Although the answer of Camp may upon this point be a denial of the allegation of the bill, yet we incline to the opinion, that the deposition, corroborated as it is by the note, which expresses a contract in harmony with that proved, is quite sufficient to turn the scale in favor of the plaintiff.

It was intimated at the bar that the deposition referred to, was taken without a special order authorizing it. This suggestion is certainly supported by the record ; but as no objection was made in the court below to the reading of the deposition for this irregularity, it could not be excluded here, even if the objection were pressed ; and the matter is here mentioned only to prevent surprise on the part of the complainant in the further progress of the cause.

The remaining question is, should the cause have been heard without bringing in the personal representatives of the defendant Camp. This defendant was certainly a necessary party when living. He was one of the two parties to the contract which induced the making of the note—he was its payee, alledged to be the trustee for the complainant, and admitted to be the assignor of Eldridge, whose judgment is enjoined. Unless he had been made a defendant, he would not be concluded by a decree affecting his interest, and the controversy could not in this suit be definitively settled. [2 Ala. Rep. 209.] The matter would be open to further litigation between Eldridge and his assignor's representatives, and between the latter and the complainant. As the object of a court of equity is to do complete justice and to settle the controversy forever, the cause should have stood over for parties, or been dismissed, unless they were seasonably made, or a sufficient excuse shown for the omission.

Camp's death was suggested, and leave given to make his representatives defendants to the bill—no reason is shown why the complainant did not avail himself of this permission to revive—it does not appear that Camp died insolvent, and that there has been no administration. In the absence of any thing in the record of which to predicate such a presumption, it cannot be indulged. That the defect of parties may be remedied, and the suit be regularly proceeded in, the decree is reversed and the cause remanded.

CLEALAND v. WALKER.

1. As a general rule where a written contract is entered into by an agent with a third person, to bind the principal and make it his act, it must purport on its face to be his contract; but it cannot be assumed as a *legal conclusion* from the fact, that the principal has no middle name—merely subscribing himself *David Walker*, that a promissory note subscribed “David S. Walker,” by his son and agent who uses the initial S., was accepted by the payees as the personal undertaking of the agent, and that the credit was given to him; but the *prima facie* intendment in favor of the principal may be repelled by proof.
2. The ratification of a contract when fairly made, will bind the principal in respect to the agent and third persons in the same manner as if the agent had acted under a previous authority. But this rule has its exceptions; thus if one was to say that he authorised another person to purchase property and furnished the means of paying for it, this would not bind the principal to pay, if the agent had converted the money; but if the money was returned by the agent, or the purchase made on a credit and the money furnished by the principal, he would be bound if the agent did not apply it.
3. For the purpose of showing that a note was intended to bind the agent and not the principal, whose name is similar, it is allowable for the principal in an action against him, to prove that a suit had been brought and prosecuted to judgment against the agent; but the effect of this evidence may be impaired by proof, that, that suit was brought by mistake.
4. Where the name of the principal is not disclosed by the agent when the contract is made, it is said that the creditor may change either of them at

his election; and although he may have debited the agent, supposing him to be the principal, he may recover the amount of the latter, if the account between the principal and agent is not altered to the prejudice of the former. But if the vendor, with a knowledge of who the principal is, makes the agent his debtor, he is bound by the election, and can't look to the principal for payment.

5. Where there is testimony tending to establish a particular result, a prayer for instructions affirming an admitted legal proposition, and which involves the consideration of this testimony, cannot be denied, on the ground that it is abstract, because the evidence is not such as should convince the jury.
6. Where a charge conforms to the law, and is authorized by the evidence, it should be given in the terms in which it is asked, though it may be necessary for the court to give additional or explanatory instructions; and the error of a refusal, cannot be repaired by giving another charge, which when critically examined, will be found to lay down *substantially* the same principle.

Writ of Error to the Circuit Court of Talladega.

THIS was an action of assumpsit on a promissory note, tried by a jury who returned a verdict for the defendant, on which judgment was rendered. From a bill of exceptions sealed at the plaintiff's instance, it appears that he introduced as a witness, one of the payees of the note declared on, who testified that it was given for a barouche purchased by David S. Walker, the son of the defendant; that the son represented himself as the duly authorized agent of his father. Proof was adduced tending to show that the son was agent, both at the time of the purchase of the barouche and the making of the note. The note, with its indorsement, &c. was then offered, and are as follows: "\$510. Wetumpka, March 24, 1837. Nine months after date I promise to pay to the order of Nickles, Poor & Hall, five hundred and ten dollars, value received.

(Signed).

DAVID S. WALKER."

No. living at }
Due Talladega, Ala. }

This note was indorsed in blank by the payees. It was proved by the same witness that the barouche was purchased on the credit of the defendant, and the note was received by the payees as his undertaking to pay. Afterwards, the de-

defendant had the barouche in his possession, and within six years previous to the commencement of this action, acknowledged that the debt was just, and that his son had had defendant's funds to pay the same.

David S. Walker, the son, was then introduced as a witness for the defendant, who stated that the barouche was purchased by him on his own account, and the note in question given by him and received by the payees as his individual liability; that the barouche had been left by him in the possession of the defendant while he was absent from the state. Evidence was also adduced tending to prove that the acknowledgment of the debt, to which plaintiff's witness referred, was made under the impression and belief that the barouche, which had not been paid for, was another which the defendant's son had purchased for him.

The defendant then produced the record of a recovery by one Gilbert Clealand, previous to the commencement of this suit, against David S. Walker, as the maker of the note now sought to be recovered. This record was offered in connection with evidence tending to show that the plaintiff in that record and in this suit was the same individual. To the introduction of this record the plaintiff objected, but the objection was overruled, and the evidence permitted to go to the jury: thereupon the plaintiff excepted.

Plaintiff then offered evidence tending to show that David S. Walker had been sued by mistake, and that no satisfaction had been had from the recovery as aforesaid: *Further*, that David S. Walker, when he gave the note, represented the name subscribed thereto to be the defendant's. Upon this point the testimony was contradictory.

The plaintiff, prayed the court to charge the jury—1. If they believed the note sued on was given for the price of a barouche, that David S. Walker had authority to purchase the same for the defendant on a credit, that he did purchase the same as the agent of the defendant, and gave the note sued on, representing the name signed to it, to be the defendant's, and it was received by the payees as the note of the defendant, then in law it was the defendant's note.

2. If David S. Walker bought the barouche for the defendant and as his agent, and the credit was intended to be

given to the defendant, and the note was received on his undertaking to pay, under the belief that the initial of his middle name was S.; and the defendant afterwards received the barouche and acknowledged the authority of the agent to give a note for the price, then this would be the defendant's note, although the agent may have fraudulently intended to sign his own name instead of his principal's, if the payees did not participate in the fraud.

These charges the court refused to give, and instructed the jury, that, if David S. Walker had authority from defendant to purchase the barouche, and did make the purchase for him and on his credit, and gave the note sued on therefor, intending the signature thereto as the defendant's name, then in law, the note would be the undertaking of the defendant. To the refusals to charge the jury as prayed, the plaintiff excepted.

W. P. CHILTON and S. F. RICE, for the plaintiff in error, contended that if David S. Walker was the agent of the defendant, his acts and declarations at the time the contract was made constituted a part of the *res gesta*, and are binding upon the principal. [2 Phil. Ev. C. & H's Notes, 181; 5 Binn. Rep. 195; 2 Root Rep. 30, 150; 11 Verm. Rep. 477; 3 Ala. Rep. 534; 8 Ala. Rep. 821.] As a general rule, perhaps the agency of a party who signs a paper should appear upon its face; but this rule is subject to various exceptions. [Story on Prom. Notes, § 70; Story on Ag. § 147, 161; 3 Chit. on Com. & Man. 193, 210, 211; 1 Richardson's Rep. 255; Fortune v. Brazier, at this term.] The subsequent ratification of the act of an agent, by his principal, as the acknowledgement of the debt for which the note is given, will make the note the principal's. [2 Stew. Rep. 479; 2 Ala. Rep. 725; Story on Ag. § 239.]

The suit which was brought against David S. Walker, if induced as it doubtless was, by his false representation, does not estop the plaintiff from suing the defendant. [21 Maine's Rep. 308; 9 B. & Cresw. Rep. 78.] Where an agent purchases on behalf of another person, whose name he conceals, the principal, when discovered, may be sued. [1 Ala. Rep. 301.] And on the other hand, either agent or principal in

such case may sue for the breach of the contract. [1 Cow. Rep. 192; 7 Wend. Rep. 172; 9 Verm. Rep. 407.] The defendant appointed his son his agent, received the property he purchased, and must pay for it, though his son abused the confidence reposed in him, or did not act strictly in accordance with the authority conferred. [3 Hill's Rep. 262; 5 Dana Rep. 449.]

F. W. BOWDON, for the defendant in error. The note is made in the name of the son—the defendant's name nowhere appears on it, and it cannot be made the foundation of an action against him. [48 Law Lib. 78, 79, 250-1-2; Story on Ag. § 155, 157, 161; 9 Co. Rep. 76; 3 Wash. C. C. R. 565; 16 Mass. Rep. 42; 1 Paine's Rep. 252; 15 Mass. Rep. 340, 344; 11 Id. 27; 10 Wend. R. 271; 6 Hill's Rep. 318.] If one assumes to act as agent without authority, he makes himself personally liable, if the note which he gives contain apt words to charge him. *Surplusage* may be stricken out, but *names* or words cannot be inserted, so as to make a new contract. [Story on Prom. Notes, 75, and note; 2 Greenl. Rep. 14, 358; 13 Johns. Rep. 307.] So, if a person without authority sign the name of another to a note, and receive the consideration, he is not liable on the note; but in an action on the case for the deceit, or in assumpsit for the price of the goods. [Chit. on Bills, 35, 36; 2 Kent's Com. 631-2, 12 Mass. Rep. 173; 11 Id. 97; 16 Id. 462; Am. Jurist, No. 41, p. 19; 3 B. & A. Rep. 114; 4 Car. & P. Rep. 121; 9 N. H. Rep. 263; 11 Sergt. & R. 129; 2 Ala. 725.]

The principal is not bound by the act of his special agent, unless the authority is strictly pursued. [9 Por. 210; 1 Brev. Rep. 490; 3 Call, 207; 8 Wend. 494.] In the present case, the proof is deficient in not showing that the defendant was not known as well by the name of David S. as David Walker. [Willes' Rep. 554; Dyer's Rep. 279, a.; 1 Greenl. Ev. 78, and note 3; 3 Taunt. Rep. 504; Cro. Eliz. Rep. 897; Cro. Jac. Rep. 558, 640.]

The record of the suit against David S. Walker, shows that the credit was given to him, or at least that the plaintiff had the right to sue either him or the defendant, and had made an election which estops him. [2 Phil. Ev. C. & H's Notes,

82, 84, 823; 4 Johns. Rep. 464; 1 Pick. Rep. 62; 1 Ala. R. 299; 2 Id. 725.]

If the law were as supposed by the plaintiff, still the charges should not be given as prayed; and the court was not bound to reform them. [9 Porter, 330.] The evidence shows that the defendant acknowledged the *debt*; and the court was asked to charge as to the ratification of the *note*.

COLLIER, C. J.—It is certainly correct as a general rule, that where a written contract is entered into by an agent with a third person, in order to bind the principal and make it his act, it must purport on its face to be his contract. [Story on Ag. § 147 to 161.]

The ratification of a contract when fairly made, will have the same effect as an original authority to bind the principal not only in regard to the agent himself, but in respect to third persons. If therefore an agent has made a contract, without authority for his principal, or beyond his authority, and it is afterwards ratified, the principal may generally sue and be sued thereon, in the same manner, and with the same effect as if he had originally given the authority. *Omnes ratihabitis retrotrahitur, et mandato priori æqui paratur*. [Story on Ag. § 244 to 246.] This rule is subject to many exceptions, where the ratification would be inoperative to divest a right or impose a legal obligation. Thus, if one was to say that he authorized another person to purchase property, and furnished him the money to pay for it at the time, this would not bind the principal to pay for it, if the agent had converted the money. But if the money was returned to him, or the purchase made on a credit, and the principal afterwards furnishes the means of payment, he would be bound for the faithlessness of the agent in not applying them.

It cannot be assumed as a legal conclusion from the fact that the defendant has no middle name indicated by the initial S, and his son and supposed agent thus writes his name, that the payees gave credit to the latter, and accepted his individual note as evidence of his personal liability. Where the plaintiff declared by the name of William T. Robinson, and gave in evidence a deed to William Robinson, the insertion of the initial of a middle name was deemed an imma-

rial variance; for the law knows of but one christian name. [Franklin v. Talmage, 5 Johns. Red. 84.] In Keene v. Meade, 3 Pet. R. 6, a commission issued in the name of Richard M. Meade, though his true name was Richard W. The court said, "it may well be questioned whether the middle letter of a name forms any part of the christian name of a party. It is said the law knows only of one christian name; and there are adjudged cases strongly countenancing, if not fully establishing, that the entire omission of a middle letter is not a misnomer or a variance." [See also Willes' R. 559.] These citations are quite sufficient to show, that subscribing the name of the maker of the note David S. is not conclusive that the defendant, David, who had no middle name was not intended. Even conceding that it was *prima facie* the note of the son, and yet the presumption may be rebutted by proof that the note was in fact made by him as the agent of the defendant, or accepted by the payees as imposing a liability upon the defendant. This point was expressly so ruled in Allen v. Brockway, et al. 17 Wend. Rep. 40. See also, 8 Cow. Rep. 31; 5 Wheat. Rep. 326; 2 Ala. 718; 4 Ala. R. 198.

For the purpose of showing that the note declared on was received as the personal liability of the son, it was competent for the defendant to prove by the record that a suit had been brought thereon, and prosecuted to judgment against the son. Whether this evidence would have been sufficient in itself to establish the fact, or that the holder of the note had elected to consider the son his debtor, we need not inquire. However this may be, it was clearly competent for the plaintiff to show that that suit was prosecuted against the son by mistake, and thus impair or destroy the effect which the record might otherwise have.

In Thompson v. Davenport, 9 B. & C. Rep. 78, it was decided that the principal may be liable, and also the agent, and *vice versa*, where the principal was not disclosed, so that it could not be inferred that there was not an election. So if a person sells goods, supposing he is dealing with the prin-

principal, but afterwards discovers that the person with whom he dealt is not the principal in the transaction, but merely an agent, he may recover the amount of the principal, though he had debited the agent : *Provided*, the state of the account between the principal and agent, is not altered to the prejudice of the former. But if the vendor knows that the person he is dealing with is an agent, and who the principal is, and notwithstanding makes the agent his debtor, he cannot, upon the agent's failure, charge the principal ; because, when he had the power to do so, he made his election. [15 East, 62 ; 4 Taunt. 574 ; 21 Maine Rep. 308 ; Story on Ag. 297, 298,]

Though the evidence may have been contradictory as to the fact of David S. Walker's agency, or as to the credit being given to the defendant, or of the acceptance of the note by the payee, as a promise by him, or of the subsequent ratification of the transaction by the defendant, yet there was certainly testimony directly to these points.

From this view of the law and the evidence, it is perfectly clear that the first charge prayed should have been given. It merely asked the court to direct the jury, that if they believed the note sued on was given for the price of a barouche which David S. Walker was authorised to purchase for the defendant, on a credit, that he represented the name signed to it, to be the name of the defendant, and that it was received by the payees as the note of the latter, then in law the defendant was liable to pay it.

The second prayer for instructions, requested the court to instruct the jury, that if David S. W. purchased the barouche for the defendant, as his agent ; that the credit was intended to be given to the defendant, and the note received as his undertaking to pay, under the belief that he had a middle name, the initial of which was S., that the defendant afterwards received the barouche, and acknowledged the authority of the agent to give a note for the price, then the note would bind the defendant ; although the agent may have fraudulently intended to sign his own name : *Provided*, the

payees did not participate in the fraud. This prayer assumed, that in addition to the purchase by the son, as the agent, and the giving and receiving the note as the written promise of the defendant to pay, the jury should be satisfied that the latter also received the barouche, and acknowledged the authority of the agent to give a note for the amount. The first part of the prayer was confessedly warranted by the evidence, and there was certainly testimony tending to show that the transaction was approved by the defendant. Whether sufficient to convince a jury is quite immaterial—it was doubtless their duty to consider it, and either party might pray the direction of the court in respect to it. It is objected that the evidence upon this point was, that the defendant had *acknowledged the debt for the barouche was just*, and that David S. W. had had funds in his hands to pay it. Whether the admission extended to the note was a question of fact, for the solution of the jury—it would be too much to assume, that it referred to the contract merely, independent of the note. It cannot then with propriety be concluded, that the charge asked in respect to the ratification or adoption of the note was abstract, and was rightly denied for that cause.

Where a charge conforms to the law, and is authorized by the evidence adduced, it should be given in the terms in which it is asked, though it may be proper for the court to give additional or explanatory instructions. The error of a refusal cannot be repaired by giving another charge, which, when critically scanned, will be found to lay down substantially the same principle.

What has been said, will sufficiently indicate the error of the circuit court. It remains but to add, that its judgment is reversed, and the cause remanded.

WALKER, ET AL. V. MILLER & Co.

1. M. & Co. indorsed for W. certain notes which the latter gave in part payment of a steamboat, and to indemnify the indorsers against liability, W. executed to them a mortgage on the boat, stipulating to have the boat insured and assign the policy to the mortgagees; W. afterwards being in failing circumstances, made an assignment of all his estate and effects (including the boat) to C. &c.; M. & Co. filed a bill against W., his assignees and others, alledging the assignment, the insolvency of W., his failure to insure, and assign the policy: *Further*, that the assignees deny their right as mortgagees, claim under the assignment an exclusive right to the boat to enable them to execute their trust, avow their purpose to employ and sell it irrespective of the complainants lien. It is also alledged that the assignees are unable to make good a loss resulting from its destruction, or condemnation to satisfy the demands of persons furnishing supplies, &c: *Held*, that the case stated in the bill, authorized the interposition of chancery, so as to make the boat subservient to the complainant's lien, upon the principle *quia timet*; and this although neither of the notes was due.
2. *Quere?* Where a bill alledged that the mortgagor of a boat was to have it insured and assign the policy to the mortgagees, which was not done, and the mortgagor admits by his answer that he had not assigned the policy, but alleges he had insured in a solvent office for the benefit of all concerned, with which the mortgagees were well satisfied; as the defendant admits that he did not comply with the contract in respect to the insurance, is not the affirmation of what he did and the complainant's assent to it, irresponsive, and should it not be proved by the respondent.
3. An assignment by a debtor of all his estate and effects to trustees for the benefit of his creditors, operates as a quit claim of the assignor's interest in the same plight and condition as he himself held the property conveyed, and will not defeat pre-existing liens; nor can the trustees be regarded as purchasers, or the *cestui's que trust* creditors within the registry acts.
4. Where a deed assigning all a debtor's property to trustees for the benefit of creditors, contemplates the exclusive management of the interests conveyed, by the trustees in the execution of their trust; it is competent for the trustees to assert their rights under the deed without making the creditors parties to a suit in chancery; and being competent to sue if they take possession of property which belongs to others, or on which others have liens they may be sued without bringing the *cestui's que trust* into court.
5. A mortgage was executed of a steam-boat to indemnify the mortgagees as indorsers of certain promissory notes, which authorised the mortgagees

to take possession of the boat if the notes were not paid as they matured, and stipulated further; that the boat should not leave the waters of the Mobile bay, and that the mortgagors would cause her to be insured and assign the policy to the mortgagees. A bill *quia timet* was filed by the mortgagees against the mortgagor and his assignees, who had obtained the possession of the boat, which was heard before the notes became due: *Held*, that the decree should require the assignees to enter into bond with sureties to keep the boat in good repair—not to remove her from the waters of the Mobile bay—to cause her to be insured and assign the the policy, and, until this was done they and their sureties should stand as insurers. *Further*, if the notes should not be paid as agreed, then, they would deliver the boat to the mortgagees free from the liens of material men, &c. If such a bond should not be given, the decree might direct a sale of the boat by the sheriff, &c., for the purpose of preserving the fund until the debt matured, or conflicting liens were adjusted.

Writ of Error to the Court of Chancery sitting at Mobile.

THE defendants in error alledge in their bill that on or about the 16th of December, 1845, one Adams sold to Robert L. Walker a steamboat called the Dallas, for the sum of \$15,000; one half of which sum has been paid, and for the remainder of the purchase money, Walker, together with Hamilton R. Johnston, gave four notes of the date aforesaid; the first of which is for the sum of \$1500, due the 1st of January, 1847; the second for \$2000, due the 1st of February thereafter; the third for \$2000, due the 1st of March, and the fourth for the same sum, payable on the 1st of April thereafter. These notes were all indorsed by the complainants, on condition, that Walker would execute a mortgage of the boat for their indemnity, and the boat was thereupon delivered to the vendee. Accordingly, a mortgage was executed by Walker to the complainants, bearing date the 16th of December, 1845, which was duly acknowledged and recorded in the county court of Mobile in 1846; the parties and boat all being in that county.

It is further alledged, that as a condition on which complainants agreed to indorse Walker's notes, the latter agreed that the steamboat should not leave the waters of Mobile bay, and should be kept insured for an amount sufficient to cover the notes, and that the policies should be transferred to

the complainants; which agreement is evidenced by a memorandum written and subscribed at the foot of the mortgage.

Since the execution of the several transactions above stated, Walker has become insolvent; on the 5th of February, 1846, he executed a deed of assignment of all his property to Thomas J. Carver and Benjamin M. Woolsey, of the city of Mobile; in the schedule of his personalty thereto annexed, is the following, viz: "one steamboat Dallas, Capt. H. R. Johnston, commander." That deed was made to enable the assignees to collect the debts due the assignor, and to sell *his* title to the property conveyed by him, and to apply the proceeds to the payment of certain debts. The assignor did not intend to impair the lien he had previously given to the complainants; for the deed of assignment affirms that it made no provision for them, because he had already given them a mortgage on the boat for their security, which he considered a full protection. But his intention was to convey the boat subject to their lien, and of this the assignees were informed; they cannot therefore be allowed to defeat the complainant, by perverting the deed to a purpose never intended.

Complainants further alledge that the assignees of Walker have taken the "Dallas" into their possession, claiming under the assignment the entire interest therein, as if the mortgage above mentioned had never been executed; that they are now running it, under the command of Johnston, for freight and passengers, on the rivers emptying into the Mobile bay, by which the boat may be subjected to the liens of mariners, and other claims, or may be entirely lost or destroyed by fire or other perils; and the lien of the complainants become wholly valueless. *Further*, neither Walker nor Woolsey and Carver have caused to be effected any insurance on the "Dallas;" that Walker is wholly insolvent, and his assignees and Johnston, both collectively and individually, are unable to indemnify the complainants for their suretyship, should they lose the benefit of the mortgage.

The assignees assume the right to sell the entire interest in the boat, and apply the proceeds to the payment of the debts as provided for in the deed of assignment, without regard to the complainants' rights; and if a sale is made by

them, the boat may be sent off or destroyed, to the prejudice of the complainants.

Carver and Woolsey are charged with confederating with Walker and Johnston, and other persons unknown to the complainants, for the purpose of taking possession of the boat and making a profit from it, without regard to the risk of her loss, or the danger of her becoming incumbered, or carried away; that Adams refuses to come in under the deed of assignment, and unless complainants can be relieved in equity, they have no adequate remedy, &c.

The bill prays that Walker, Carver, Woolsey and Johnston be made defendants; that process issue to bring them before the court, &c.; that the mortgage and lien of the complainants upon the "Dallas" be established and made effectual in law, in preference to the claim set up under the deed of assignment; that Carver, Woolsey and Johnston, and all others, be enjoined and forbidden to use, remove, sell or otherwise dispose of her, until the sum for which she will sell be properly secured, and proper means be taken to make it available to the complainants; that the boat be insured, so as to prevent a loss to the complainants in the event of her loss by fire, &c.; that she be placed in the custody of the sheriff, or other trustee, until properly secured or disposed of; or that she be sold: *Further*, that a receiver be appointed to take charge of and manage the boat, &c. unless bond with good surety be given that the value thereof to the extent of the complainants' claim, be paid in discharge of the indorsements made by them; and that such other relief as may be appropriate be granted.

The defendant Walker answered, admitting the purchase of the "Dallas" by him, as alledged by the complainants, the execution of the mortgage and its delivery to them more than thirty days previous to the 9th February, 1846, when he acknowledged it with a view to its registration. He states that the boat was insured when he purchased it at Louisville, Kentucky, for \$12,000, and he caused the insurance to be renewed in responsible insurance offices in the same city, for the same amount, for the benefit of all concerned, and the policies of course insure to the complainants to the extent of their interest. Respondent admits his insolvency,

that he had made an assignment of his estate for the benefit of his creditors; but did not make any provision for the benefit of the complainants, because he had supposed the mortgage on the boat was an ample indemnity, and would remain unaffected and in full force. He states that he did inform his assignees of the existence of the complainants' mortgage at the time he executed the deed to him—Carver, previous to the purchase of the boat, was informed of his intention to purchase, and to propose to the complainants to take a lien on the boat and become his indorsers for \$8000.

Carver and Woolsey filed several answers. They each insist upon the benefit of a demurrer—the former admits that Walker informed him of his intention to purchase the “Dallas,” and propose to the complainants to give them a lien on it, if they would become his sureties for eight thousand dollars of the purchase money—both of them admit that on the 5th of February, 1846, at the time Walker executed the deed of assignment, he informed them that the complainants had a lien or mortgage on the “Dallas,” and were secured; but did not describe the lien more particularly. This was the only notice these defendants had of the existence of the mortgage, until after the deed of assignment was executed. Both these defendants insist that the mortgage was not acknowledged, or proved and registered, until more than thirty days after its execution and delivery to the mortgagees. They affirm that the boat was insured, as Walker alleges, and was under an insurance for the benefit of all concerned, when the bill was filed. They admit that under the assignment, they took possession of the boat, and run the same for freight, &c. under the command of their co-defendant, Johnston; that they believe Walker did not intend by the assignment to impair the lien of the complainants, yet insist that the failure of the latter to have their mortgage recorded within thirty days from its delivery, made it inoperative. They therefore claim the entire interest in the “Dallas,” but as trustees, shall sell only such interest as they acquired by the assignment. These defendants, as well as their co-defendant, Walker, deny that the boat has run upon other waters than those entering into the Mobile bay, since the execution of the mortgage to the complainants; and therefore insist that

the mortgage has not been forfeited, and that no sufficient ground is stated in the bill for the interposition of equity. Both the defendants admit that they are not creditors of Walker, and that they are not able to make good the loss to the complainants, should the boat be destroyed, or they otherwise fail to obtain the benefit of their mortgage.

The defendant, Johnston, denies that he had any knowledge of the existence of the mortgage, until after its registration; admits that he was employed by Walker as the commander of the "Dallas," and since the assignment to Carver and Woolsey, has been employed by them in the same capacity. He demurs to the bill on the ground that he is an improper party, having no interest in the matter in controversy. All the defendants deny all fraud, and combination, to remove the boat, or otherwise prejudice the complainant's lien.

The complainants replied to the answers, re-affirming the truth of the allegations of their bill, and averring their sufficiency to sustain their prayer for relief. It is also alledged, that the answers are wholly insufficient, and irrelevant, and are untrue—all which the complainants are able, and willing, and offer to prove, &c.

The complainants objected to the admission of the schedules offered by the defendants, because they are no part of the deed of assignment—are not signed by either party—are not identified in any manner—were not proved or acknowledged, but were lodged at a time other than that when the deed was deposited in the clerk's office for registration. It does not appear that the schedules are the papers referred to in the deed, as being "in the possession of J. T. Carver." This being the case, it was insisted, that the registry of the deed was imperfect.

A decree was rendered by the chancellor, reciting that the cause came on to be heard on the bill, answers, deposition, and the documents produced on the trial, to wit, the original mortgage to the complainants, the agreement for insurance, and the transcript of the mortgage certified from the records of the county court of Mobile; also, the original deed of assignment set up in the answers, and certain schedules with the indorsement thereon, without further proof to show that they were duly recorded and part of that deed. The com-

plainants objected to the schedules for the reasons mentioned above. Thereupon, it was adjudged that the complainants were entitled to relief as prayed by the bill.

But it appeared to the court that divers persons by petition filed therein, claim liens on the steamer "Dallas" for stores, &c. furnished, under the several statutes providing a remedy by libel in the nature of admiralty proceedings, and pray that the chancellor will subject the boat to their demands, and allow them the same remedy which is granted in the proper court, inasmuch as the boat is in the custody of his court, and they cannot enforce their demands in the appropriate tribunal. These petitioners, the chancellor was of opinion, were entitled to be heard, and their claims would therefore be considered when the question of the distribution of the fund should come up.

It was further ordered and decreed, that the mortgage, agreement and lien of the complainants is paramount and effectual against the defendants; that the register do sell the steamer "Dallas," her apparel and furniture, at, &c. for cash, first giving ten days' previous notice, &c. unless the defendants, or some one of them, shall within five days from the rendition of the decree, give to the register a bond with good security, payable to the complainants; conditioned to indemnify and save them harmless from all damages or loss by reason of their indorsements alledged in the bill, &c. It was also referred to the register to ascertain how much was due on the notes indorsed by the complainants—how much was due to each of the claimants of liens, and to report, &c.

A. F. HOPKINS and W. G. JONES, for plaintiffs in error. The assignment made by Walker to Carver and Woolsey on the 5th February, 1846, and recorded on the 6th February, 1846, provides for the payment of certain preferred creditors *absolutely and unconditionally*. Therefore, their assent to the deed will be presumed, though they have not actually executed it; and such deed is not void because other creditors are provided for on condition of their executing a release. [9 Port. 566; 7 Ala. 262.]

Carver and Woolsey are mere naked trustees for the credi-

tors, having no interest themselves. Equity will look to the substance of the case—to the parties really interested—and will regard C. & W. as standing in the place of, and representing the creditors; although they were not their agents in obtaining the assignment. [11 Wheat. Rep. 82, et seq.; 2 Binn. Rep. 497; 5 Cond. Eng. Ch. Rep. 343.]

T. P. Miller & Co. lost the priority of the lien of their mortgage, as against the creditors claiming under the assignment, by failing to have their mortgage recorded in due time. [Clay's Dig. 255, 256, § 5.]

The creditors are regarded as purchasers for a valuable consideration, within the meaning of the statute, and having no notice of the unrecorded mortgage, until after the assignment was executed and recorded, the statute makes the unrecorded mortgage void as to them. [8 Ala. R. 866, and the cases there cited. [If regarded as *creditors*, notice will not affect them. [2 Lom. Dig. 368.]

It may be admitted that creditors at large are not the creditors meant by the statute; but the creditors provided for by the assignment ceased to be creditors at large as soon as the assignment was made and recorded. They thereby acquired a specific lien on the property for a liquidated debt; and it makes no difference whether such lien is acquired by judgment, execution, *attachment, mortgage, assignment, deed of trust* or otherwise. [8 Ala. 866; 1 Metcalf, 214.]

Carver and Woolsey were appointed and made assignees by Walker, and not by the creditors. No notice to C. & W. could affect or prejudice the rights of the creditors. [11 Wheat. 87; 2 Binney, 497; 1 Tamlyn, 172; 5 Cond. Eng. Ch. R. 343; 4 Eq. Dig. 404, § 15, citing 2 Johns. R. 320.]

Though the assignment was doubtless made of his own will, yet as it was to secure *bona fide* debts, it was not technically a mere *voluntary* conveyance. After it was recorded, it was irrevocable by Walker; and any one of the preferred creditors might certainly insist on and enforce its performance. [2 Ala. Rep. 315; 1 Stewt. & P. Rep. 11.]

Even if the court will not look to their creditors and protect their rights under the assignment, but looks only to Carver and Woolsey, yet C. & W. are to be considered purchasers. [See the cases above cited.]

In that point of view, it is insisted that C. & W. had not in fact such *notice* of the unrecorded mortgage, as would defeat the statute and set up the unrecorded mortgage. To have this effect, it is not sufficient to show circumstances which might put purchasers on inquiry. The *notice* must be *clear, definite, and exact*. [2 Sugd. on Vend. p. 255, ch. 16, note 403; Ib. 315, 317; Fonb. Eq. 449, 450, 451; 2 Atkyns, 275; 3 Ves. Jr. 478; 19 Id. 435; 8 Cowen, 260; 2 Johns. Ch. R. 182; 4 Eq. Dig. 404, § 15.]

The fact that Carver's name appears subscribed as a witness to the mortgage, can have no influence in showing notice; for it is clearly proved that he subscribed his name *after* the assignment to him and Woolsey was made and recorded. Besides, being a subscribing witness, is not even *prima facie* evidence of knowledge of the contents of the instrument. [2 Sug. on Vend. 343; 5 Taunt. 257; 1 Vesey, Sr. 6; 1 Esp. Rep. 57.]

The notes being not yet due, the bill was prematurely filed. No sufficient ground is shown for coming into equity before the forfeiture of the mortgage. [4 Johns. Ch. R. 571.]

Walker retained the right of possession of the boat, until there was a failure by him to pay either one or all the notes, and this right would be liable to the beneficiaries under the deed; or if not required to answer the purposes of the deed, might be subjected to the debts of other creditors. [2 Ala. R. 314.] The mortgagee may convey his equity of redemption in personal property. [4 Ala. Rep. 469.] In estimating the value of the "Dallas" at \$15,000, the mortgagor shows that he intended to assign the entire interest to his assignees, and not merely his right to the possession.

It is not alledged that the assignees or creditors of Walker had notice of the agreement to insure the boat, and the assignment cannot be prejudiced, even if Walker failed to comply with this agreement. Besides, a non-compliance did not have the effect to operate a forfeiture of the mortgage. But the proof supports the answer, and shows that the insurance was satisfactory.

The danger that the complainants' mortgage might be defeated by the boat being libeled and condemned at the suit of persons furnishing supplies, &c. did not under the circumstances authorise an injunction to issue; it was contemplated

by the contract between the complainants and Walker, that the boat was to be run until the mortgagors' default, upon the waters of the Mobile bay. If Walker or his assignees attempted to remove the "Dallas," then a court of equity could interfere for the protection of the complainants' security. But the removal of the boat, or the failure to insure, did not authorise its sale without giving to the assignees the option of giving a bond with surety for the complainants' indemnity.

The case made by the bill does not negative the fact of the execution of the deed by the creditors of the third class, if this be at all material. [8 Ala. Rep. 874.] No decree could be rendered in this case affecting the interest under the assignment of the beneficiaries. They are indispensable parties, and this question is raised by the demurrer in the answers. [Story's Eq. Plead. § 82, 83, 709.]

G. N. STEWART and J. A. CAMPBELL, for the defendants in error. The bill is maintainable as a bill *quia timet*—the boat has been conveyed by the mortgagor to irresponsible men who claim the exclusive estate in it, who announce their intention to sell it—each act of employment subjects it to loss, and each debt contracted by the assignees on account of the boat creates a lien superior to the complainants'. [18 Vin. Ab. 141; Hob. Rep. 217; Drewry on Inj. 176, 273; 10 Ves. Rep. 159; 1 Ired. Rep. 42; 2 Ired. Eq. Rep. 569; 7 Dana's Rep. 230; 6 Ala. Rep. 463; 8 Id. 206; Baldw. Rep. 232; 2 Story's Eq. 35, 36, 129; 1 Freem. Eq. Rep. (Miss.) 273; 1 Dev. Eq. Rep. 151; 2 Id. 31.] An injunction will be granted in favor of the first equitable mortgagee against a second legal mortgagee to restrain him from selling till the rights of the former are established. [Drewry on Inj. 342.] So where it is necessary to protect the rights of parties by executing a deed at once, chancery will direct it to be done, though the time appointed for its execution has not arrived. [7 Ala. Rep. 697.]

The facts set forth in Walker's answer, in respect to the insurance, are in avoidance, and have not been proved; so far from denying the allegation of the bill upon this point, they tend rather to support it.

It is denied that the assignees take as purchasers—they ac-

quire the right which their assignor had, subject to defences good against him. [1 Paige's Rep. 125; 4 Id. 215; 10 Id. 211; 6 Ala. Rep. 639; 8 Id. 920; 3 How. Rep. U. S. 333; 18 Pick. Rep. 245; 20 Id. 321.] Such is the rule in cases of bankruptcy. [Owen on Bankr. 71; Eden's Bankr. L. 284, 291, 203.] To entitle a creditor to insist that a deed made by his debtor has not been registered as required by the statute, he must have acquired a lien by some legal proceeding. Any act of the debtor which gives a lien to the creditor, constitutes the latter a purchaser of the estate. But to make a purchaser within the meaning of the registry acts, the consideration must be something more than a security for, or an indemnity against a pre-existing demand. Courts have never gone farther than to admit a very small additional consideration as sufficient. [5 Hump. Rep. 26; 1 Pick. Rep. 164; 4 Id. 253; 8 Conn. Rep. 186; 4 Dana's Rep. 258; Harp. Rep. 295; 3 Hare, 416; 5 Greenl. 369; 6 Id. 256; 13 Con. Eng. Chan. Rep. 121; 8 Ala. 867; 3 Id. 573.]

The deed of assignment is void, [4 Ala. 374; 6 Hill's R. 438]; and is inoperative because no creditor has assented to it. [10 Pick. 408; 7 Ala. 262; 9 Ala. 305; Hodge v. Wyatt & Houston, June Term, 1846.]

The notice to the assignees was part of the *res gesta*, viz: making the assignment. It informed them that they received it under an incumbrance to the complainants. Carver heard previously that it was to be incumbered, and could readily refer his information to what he had before heard. [8 Ala. 862; 3 H. & M. 144; 3 Conn. 146; 4 Litt. 318; Coventry's Conv. Evi. 217; Miller on Eq. Mort. 89, 90, 110, 223.]

In respect to the argument by the plaintiffs in error, that the assignment was the act of the grantor, and requires not the assent of trustees or *cotuis que trust*, it is insisted that the inference drawn from it, is not maintainable; inasmuch as the grantor could not by his own voluntary act defeat an estate which he had created. [10 Paige, 210.] The argument as to the disposition of the fund produced by the sale of the boat is premature. That question is still before the chancellor, to be decided by those who have liens as material-men and laborers. The complainants do not insist that they are

entitled to all the fund. The boat is not directed to be sold as a part of the decree in the principal cause; but because the detention of the property is prejudicial to all the parties, and as a means of preserving it, pending the litigation.

COLLIER, C. J.—It is insisted for the plaintiff in error, that the cause should have been repudiated by the chancellor, as there is no sufficient ground shown for the interposition of equity. The suit, if sustainable, must be as a bill *quia timet* which is said to be in the nature of a writ of prevention, and intended to accomplish the ends of precautionary justice. Such bills are usually applied to prevent wrong, or anticipated mischiefs, and not merely to redress them when done. Courts of equity sometimes interfere in such cases by the appointment of a receiver to receive rents or other income; sometimes by an order to pay a pecuniary fund into court; and sometimes by the mere issuing of an injunction; thus adapting the relief to the precise nature of the particular case, and the remedial justice required by it.

In regard to equitable property, the jurisdiction is equally applicable to cases where there is a present right of enjoyment, and to cases where the right of enjoyment is future, or contingent. “The object of the bill in all such cases is to secure the preservation of the property to its appropriate uses and ends; wherever there is danger of its being converted to other purposes, diminished, or lost by gross negligence, the interference of the court becomes indispensable. It will accordingly take the fund into its own hands, or secure its due management and appropriation, either by the agency of its own officers or otherwise. Thus, for instance, if property in the hands of a trustee for certain specific uses, or trusts (either express or implied,) is in danger of being diverted, or squandered, to the injury of any claimant, having a present or future fixed title thereto, the administration will be duly secured by the court according to the original purposes, in such manner as the court may in its discretion, under all the circumstances, deem best fitted to the end; as by the appointment of a receiver; by payment of the fund, if pecuniary, into court; or by requiring security for its due preservation and appropriation.” [2 Story’s Eq. § 826-7.]

The remedy by bill *quia timet*, is appropriate, where there is any danger of loss, or deterioration, or injury to personal property, which is in the hands of the party entitled to the present possession, and in which another person is entitled to a future right of enjoyment. It applies where a future interest in personal property is assigned by a debtor to his creditors; in such case the latter may come into equity to have the property secured to their future use. In *Johnson v. Mills*, 1 Ves. Rep. 282, Lord Hardwicke said, that nothing was better settled than, wherever a demand was to be made out of assets certainly due, but payable at a future time, the person entitled thereto might come against the executor to have it secured for his benefit, and set apart in the meantime, that he might not be obliged to pursue those assets through several hands: *Further*, that there was no ground for a distinction between a legacy and a demand by contract. See also, 2 Ves. Rep. 619; 1 Chan. Cas. 223; 2 Johns. Ch. Rep. 561; 4 Id. 132; 6 Ves. Rep. 734; Jeremy's Eq. Jurisd. 354, *et post*; 1 Bro. Ch. Rep. 108; 2 Id. 321; 2 Story's Eq. 129 to 146; Ired. Eq. Rep. 42; 2 Id. 573; 7 Dana's R. 232; 6 Ala. R. 463; 1 Freem. Ch. Rep. 273; 10 Ves. R. 161; 7 J. Marsh. R. 409; 5 Litt. R. 180.

A mortgagor, it is said, will not be allowed to do any acts injurious to, or diminishing the security of the mortgagee; and if he should commit, or attempt to commit acts of waste, he will be restrained therefrom by process of injunction. In *Call v. Scott*, 4 Call's Rep. 402, it was held, that where A gave a mortgage to C, to indemnify the latter against his indorsement for the former, a bill *quia timet*, will lie at the instance of C, against A's representatives, for a decree that they shall pay the indorsee, and indemnify C against his indorsement. So it has been decided, that equity will not, except under special circumstances, entertain a bill for the specific execution of a contract respecting a chattel; yet where a trust is concerned, which is peculiar to equity, it will interfere and relieve when it is ended, or is likely to be abused. [3 Marsh. Rep. 477.]

In regard to the respective interests of the mortgagor and mortgagee, it has been held that the mortgagee of personal property may maintain trover against the attaching creditor,

though he stipulated with the mortgagor that he should retain possession and sell the property to pay the debt. [3 Fairf. Rep. 282.] So if the mortgagor cut and carry away timber trees, he is liable to the mortgagee in possession in an action of trespass for their value. [4 Munf. Rep. 382.; 2 Greenl. 132, 173, 387.] It may be regarded as the settled law of this State, that the mortgagor's interest, even in personal property mortgaged by him, of which he retains the possession, may be levied on under execution, and if the mortgage has not become forfeited, so as to entitle the mortgagee to interpose a claim at law, his remedy is in equity, where the interests of the mortgagor may be ascertained and separated from that which he asserts. [2 Ala. Rep. 318; 4 Id. 469; 5 Id. 770; 6 Id. 27.]

Walker admits that he stipulated to insure the "Dallas," for an amount equal at least to the notes in which the complainants are his sureties, and to assign the policy to them. Thus far his answer is responsive, but in affirming that he did insure, even for a larger sum, *for the benefit of all concerned*; that the policy to the extent of the complainant's liability insured to them in the event of a loss, and that they were well satisfied with it, the answer attempts to avoid a strict compliance with the respondent's undertaking, and its allegations should be proved. In the condition of the record, must we not conclude that Walker failed to comply with his stipulation in respect to the insurance? This being the case, may not a court of equity entertain the complainants' bill, and give them the indemnity which the insurance would have afforded?

Again: the assignees of Walker deny the right of the complainants as mortgagees—claim under the assignment an exclusive and absolute right in the steamboat to enable them to execute the trust conferred upon them—avow their purpose to employ or sell it, without regard to the complainants' lien, and admit their inability to make good any loss which may be sustained by the destruction of the boat, or result from its condemnation under the statute to satisfy the demands of shippers of merchandise, persons furnishing supplies, &c. This being the case, we cannot doubt that the complainants may well apprehend the security afforded them

by the mortgage is in jeopardy and may become unavailable, and that it is competent for chancery to interpose its extraordinary powers and make the mortgaged property subservient to the lien. This, we think, is so obvious a sequence from the law as we have stated it from the books, that argument is not necessary to illustrate it. See *Lyon, et al. v. Hunt, et al.* at this term.

We are now brought to consider whether the failure of the complainants to have their mortgage recorded, postponed its operation, so as to give priority to the assignment made by Walker for the benefit of his creditors. The act of 1828, "more effectually to prevent frauds and fraudulent conveyances, and for other purposes," enacts that "all deeds and conveyances of personal property in trust, to secure any debt or debts, shall be recorded in the office of the clerk of the county court wherein the person making such deed or conveyance shall reside, within thirty days, or else the same shall be void against creditors and subsequent purchasers, without notice." In *Smith & Co. v. Zurcher*, 9 Ala. 208, it was decided that mortgages were within the meaning of the act, just as much as conveyances, which in technical language were called deeds of trust. [See also 4 Ala. R. 469.] The questions arising under this branch of the cause are—*First*—Do the assignees or the beneficiaries under the deed stand in such a predicament as purchasers or creditors, as entitles them to defeat the operation of the mortgage because it was not recorded in due season? *Second*—If so, does it not appear, although the mortgage was not registered in time, that the assignees had notice of it, when they received the deed of assignment.

In *Dickerson v. Tillinghast*, 4 Paige, 215, the question arose as to what was necessary to constitute a *bona fide* purchaser within the meaning of the registry act of New York. The chancellor said he was one who had actually parted with his property on the credit of the estate, so as to give him an equitable claim or specific lien thereon, without notice of a prior equity, and had also clothed that equitable lien with the legal title, by taking a deed or mortgage. Such a purchaser would not be divested of that legal title or lien,

in favor of a prior equity. But if he had notice of a prior equity at any time before he had parted with his property on the credit of the estate, and before he had united the subsequent equity with the legal title, he was not considered as entitled to protection against the prior equity as a *bona fide* purchaser: Further, the words "*bona fide* purchaser," were intended to be used in the registry acts according to the established meaning thereof, and must receive the construction which had been previously placed on them in the court of chancery in reference to the principle of equity here stated. It was added, that, if the subsequent purchaser merely takes the legal estate in payment of, or as security for a previous debt, without giving up any security, or divesting himself of any right, or placing himself in a worse situation than he would have been, if he had received notice previous to his purchase, of the title or lien of a third person, chancery will not permit him to retain the estate he has thus acquired to the prejudice of such person. [See also 2 Paige's Rep. 300, and the citations in each of these cases.] So it has been held that a purchaser under a quit-claim deed without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration without notice—that such vendee takes only what his vendor could lawfully convey. [3 How. Rep. (U. S.) 333.]

It is said to be a general rule of law, that a person cannot by any voluntary act of his own, transfer to another a right which he does not himself possess. And it has been accordingly decided, that, where an insolvent debtor has made a fraudulent transfer of his property, or has discharged his own debtor from liability for the purpose of defrauding his creditors, so that he cannot reclaim the property or sustain a suit for the debt in his own name, he cannot by an assignment which is wholly voluntary on his part, take away the right of his creditors generally to set aside the fraudulent transfer, or to recover the debt fraudulently discharged, and transfer that right to his own assignee for the benefit of preferred creditors; or even for the benefit of all his creditors equally. [10 Paige, 211, 219.]

In protecting the interest of subsequent purchasers without notice, against the effect of prior unregistered conveyances,

the language employed in the statutes of the different states, if not identical, is substantially the same : consequently, the decisions of one state as to the character of a *bona fide purchaser* within the meaning of the registry acts, are at least persuasive evidence of the law in every other state. The prefix "*bona fide*" does not essentially change the meaning of the statute, and cannot warrant an interpretation different from what it would receive if they were omitted ; for no purchaser is in a condition to controvert the rights of creditors, or of persons having equitable liens, or an incomplete legal title, unless his purchase was made *in good faith* and *without notice*.

An assignment by a debtor in failing circumstances for the benefit of all his creditors is regarded as voluntary on his part, and it will be thus regarded, although it prefers some of the creditors to others. It must be considered rather as a devotion of the property conveyed to the payment of the grantor's debts, than a sale of it to trustees or the beneficiaries under the deed. Though the debtor has parted with his estate, and thus invested his assignees with the legal title, that they may dispose of it for the benefit of others, yet neither the assignees nor creditors can in popular parlance be said to have purchased it. The assignor has merely substituted the assignees to his own rights, and made them the depository of the title which he had, and nothing more. By such a transaction, it cannot be intended that the debtor contemplated the divestiture of rights, which he had previously transferred ; but the reasonable inference is, that he proposed to substitute the assignees to the same situation in respect to the property as he himself had occupied, and not to confer a greater or less estate. And as neither the assignees nor the creditors advanced money or other thing of value as an inducement to the assignment, but were most probably passive, their understanding in respect to the interest conveyed must have harmonised with the intention of the assignor. We need not however extend this course of reasoning, for it is perfectly clear, that, although the assignees have the legal estate, yet they have no interest apart from the trust with which they are invested by the deed. The beneficiaries have not accepted in satisfaction of their demands any specific property,

and retain their character of creditors—looking to the assignment as a mere security. [See 3 Kinne's L. Comp. 42 to 49, and citations there.]

The cases cited upon this question, are directly in point, and we think are well supported by reason. The citations from 2d and 4th Paige, establish that a purchase within the meaning of the registry acts, is one who has parted with his property on the credit of the estate without notice of a prior equity, and who by taking a deed or mortgage has clothed himself with the legal title. 10th Paige maintains that a person cannot by an assignment for the benefit of creditors, which is merely a voluntary act of his own, transfer to another a right which he does not himself possess. The case in 3d Howard decides, that a vendee under a quit-claim deed takes only what his vendor could lawfully convey, and is not entitled to protection in equity as a purchaser for a valuable consideration without notice.

In the case at bar there is no pretence that any consideration other than Walker's indebtedness, induced the making of the assignment; and it is clear from the terms of the statute, that the mortgage to the complainants is good as between the mortgagor and themselves: such is the uniform current of decisions in the construction of kindred enactments. It therefore follows, that the assignment did not defeat the mortgage.

Again: the assignment, as we have seen, only operates as a quit-claim of the assignor's interest. This being so, there is no express warranty, and none can be implied; consequently, the assignees, or the *cestuis que trust*, cannot be regarded as purchasers within the meaning of the registry acts.

In *Daniel v. Sorrells, et al.* 9 Ala. 436, we decided that the statutes which declare that an unregistered deed shall be imperative against *creditors without notice*, does not mean *creditors at large*, but such as have obtained a lien by the recovery of a judgment, &c. Here, the only lien which it is pretended the creditors have acquired, is that resulting from the deed of assignment, and this we have seen merely transfers the interests of the assignor in the same plight and condition in which he had them—without creating a lien upon, or divesting the rights of third persons in property he had

disposed of. The *cestuis que trust*, or the assignees as their representatives, cannot in the character of creditors postpone the complainants' claim as mortgagees. Having attained these conclusions as to the effect of the failure of the complainants to cause their mortgage to be recorded, we need not inquire whether the assignees had notice of the mortgage when they accepted the assignment.

It is insisted by the plaintiffs in error, that the beneficiaries under the deed of assignment are necessary parties to the suit, and that for the failure to join them, the demurrer contained in the answers should be visited on the bill. Lord Eldon said that "in *most* cases respecting trust property," the *cestuis que trust* should be made parties; but where the existence of the property is not affected, and the only object is to transfer it into the hands of the trustees, the latter need not bring the *cestuis que trust* into court. It has been held, that "trustees of real estate for payment of debts or legacies, may sustain a suit either as plaintiffs or defendants without bringing before the court the creditors or legatees for whom they are trustees;" but if the existence or due administration of the trust fund is called in question, then they must be made parties. So, it is laid down as a general rule, that in a bill founded on a contract, it is necessary to make only those persons parties, who are parties to the contract; yet it does not follow that a third person for whose benefit it was made, may not come into equity and compel its fulfilment. [Calvert on Part. 8, 212 to 219.] In *Bifield v. Taylor*, 1 Beat. Rep. 91, and 1 Mall. Rep. 192, it was decided, that when the intention of the person originating a joint beneficial interest in a fund, appears clear, to constitute the party in whom the legal right of action is vested, completely the representative of the beneficiaries, that case forms an exception to the general rule, that in equity the *cestuis que trust* shall be parties to a suit instituted by their trustee, and entitles him to sue in equity without their being joined. This decision rests upon the ground that the legal title is vested in the trustees for the express purpose of enabling them to execute all the duties attached to the trust, without the intervention of the *cestuis que trust*. So, in *Braker v. Devereaux*, 8 Paige, 513, it was said, if the absolute title to

an undivided portion of the premises is vested in a trustee upon a valid trust, it seems not necessary to make the *cestui que trust* a party to a partition suit in chancery; but, that it will be sufficient to bring the trustee, who has the whole legal estate in the premises, before the court. Where a mortgage of lands has been executed to a trustee to secure the payment of debts to sundry persons, the trustee may maintain a suit in chancery to foreclose without making the *cestuis que trust* parties. [4 Stew. & P. 447. See also 2 B. Monr. 232; 1 Green's Ch. R., 305.]

The rule which requires all persons interested to be made parties in chancery has other exceptions; as where from the number interested, it would be impossible, or would produce great inconvenience. Thus, part of a crew are permitted to sue for prize money; and where the creditors of a person are very numerous, it is not necessary that all should unite in a suit. [1 Wash. C. C. Rep. 517; 2 Mason's Rep. 181.] And in *Hallett v. Walker*, 2 Paige's R. 15, it was said, that the rule requiring all persons materially interested in the subject matter of the litigation to be made parties to the suit; may be dispensed with, when it becomes extremely difficult or inconvenient. [See also 10 Wheat. 152.] Lord Hardwicke, in *Yates v. Hambly*, 2 Atk. R. 237, thus expresses himself: "Where a mortgagee who has a plain redeemable interest, makes several conveyances upon trust in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties." [See 2 Madd. Ch. 190.]

The authority conferred upon the assignees of Walker contemplates their exclusive management of the property and interest transferred for the benefit of his creditors, and it is competent for the assignees to assert their rights under the deed without making the creditors parties to a suit in chancery. Being competent to sue if they take possession of property which belongs to others, or on which these persons have liens, they may be sued without bringing all the parties into court.

Besides, the beneficiaries under the trust deed are so numerous, that it would be exceedingly inconvenient, if not

impracticable, to prepare a cause for hearing, in which they were all parties—to say nothing of the expense and delay consequent upon such a suit. The mortgage expressly authorises the complainants to take possession of the steamboat upon the failure of the mortgagor to pay either or all the debts against which it is intended to secure him, to sell or otherwise dispose of it; and it cannot be that in a suit *quia timet* to restrain the removal of the mortgaged property so that it may be available to the mortgagees, that it is necessary to look beyond the assignees of the mortgagor who are in possession under an absolute legal estate. If the *cestuis que trust* have equitable interests against the mortgagees, they may become actors, and arrest a sale of the boat under the mortgage, or claim the proceeds. From this view, it results that the bill is not defective for the want of parties.

What we have said is decisive of the rights of the complainants and defendants, and indicates that the lien of the complainants under the mortgage is paramount to the claim of the assignees of the mortgagor, or any one else growing out of the assignment. But the question has been raised at the bar, whether, admitting the superior right of the mortgagees, the decree as it affects the assignees is correct.

If the notes indorsed by the mortgagees were not paid as they matured, then they were authorised by the mortgage to take possession of the “Dallas” and dispose of it, so as to pay them. In the mean time, the mortgagor stipulates that the steamer shall not leave the waters of the Mobile bay: *Further*, that he will cause her to be insured and so continued for an amount equal at least to all the notes, in some responsible office, and that he will indorse the policy to the mortgagees.

The interest of Walker in the steamer up to the time the mortgage became forfeited, according to repeated decisions of this State, could have been levied on and sold under a *feri facias*; and if it could be thus disposed of to satisfy a creditor's demand, we can perceive of no well founded reason, why the mortgagor should not be permitted to sell or assign it for the benefit of creditors. One who takes under such an assignment must be entitled to the entire interest which the mortgagor had, and has undertaken to convey. In respect

to the property, he will stand precisely in the same situation as the mortgagor did ; though perhaps upon a showing less strict, the mortgagee might file a bill *quia timet* against the assignee and require security for his indemnity. But upon the allegation that the mortgaged property had been transferred for the benefit of creditors to insolvent assignees, a decree could not be rendered before the debt provided for by the mortgage matured, directing a sale of the property, unless the assignees entered into bond with sureties to pay all the notes according to their tenor and effect. Such a requisition upon the assignees does not conform to the contract between the mortgagor and mortgagee—instead of requiring them to give such security as will insure the benefit of the mortgage to the mortgagee, the decree directs the boat to be sold, unless they will stipulate for the payment of the debt ; thus superseding the mortgage, or giving a new and independent security.

The decree should have required the assignees to enter into bond with sufficient sureties to keep the “Dallas” in good repair—not to remove her from the waters of the Mobile bay—to cause her to be insured, and assign the policy as agreed between the mortgagor and mortgagee, and until this was done, they and their sureties should stand as insurers ; and further, if the notes should not be paid as provided, then they would deliver the “Dallas” to the mortgagees free from the liens of material-men or other persons, which could affect its sale at a fair price. In the event that such a bond was not given, the decree might have directed a sale of the boat by the sheriff, &c. as a means of preserving the fund until the debt matured, or conflicting liens were adjusted. We might here render the proper decree, but as we do not know what proceedings have taken place under that rendered by the chancellor, we think it safer to remand the cause, that it may be proceeded in according to the principles indicated. The decree is accordingly reversed, and the cause remanded.

INDEX.

ABATEMENT.

1. A plea in abatement of an attachment, merely denying the defendant's right to the property levied on by a sheriff, or other officer, is bad on demurrer. The return is matter of record, and cannot be contradicted by extrinsic evidence, upon an allegation which merely denies its falsity.—*King v. Bucks*, 217
2. The receiving a plea in abatement, after the time for filing such a plea has passed, is matter of discretion in the court below, and cannot be reviewed in this court. *Massey v. Steele's Adm'r*, 340
3. It is no answer to a plea in abatement, alledging that the defendant was dead at the commencement of the suit, that in the progress of the suit he appeared by attorney, as a dead man cannot appear by attorney. *Ib.* 340
4. The defendant is entitled to costs on a judgment abating the suit. *Ib.* 340
5. *Semble*: A plea in abatement is bad on demurrer for duplicity. *Caldwell v. Branch Bank at Mobile*, 549
6. Where the writ is at the suit of the *Branch Bank at Mobile*, and the declaration in the name of the *Branch of the Bank of the State of Alabama at Mobile*, (the designation employed in the charter,) the variance is no ground of abatement; for if the names are not substantially the same, the writ may be amended on motion, so as to make it conform to the declaration. *Ib.* 549
7. A variance between the indorsement on the writ, and the declaration, is not pleadable in abatement. *Ib.* 549

ACCOUNT.

1. An admission of indebtedness, in a precise, ascertained sum, is not an open account, or barred by the statute of limitations of three years. *Drinkwater v. Holliday*, 134
2. A continuous running account, between the same parties, is an entire thing, not susceptible of division, the aggregate of all the items being the

ACCOUNT—CONTINUED.

amount due, and therefore a recovery of a part by suit, will bar an action for the residue. The rule applies to a physician's account, who having sued for and recovered a part, cannot maintain an action for the residue of the account. *Oliver v. Holt*, 574

ACTION, AND ACTIONS QUI TAM.

1. Where an administrator has paid to the guardian of a distributee of the intestate's estate, an amount of money beyond the distributive share, the former, although he has made a final settlement of his accounts with the orphans' court, may maintain an action in his own name against the guardian for the excess paid him; and the latter may retain from the funds of the ward, for his reimbursement—the orphans' court not being authorized to allow the administrator a credit for the overpayment, he is personally chargeable with it: and may therefore recover it back. *Sellers, &c. v. Smith*, 264
2. Where an overseer employed by the year, is discharged before the termination of that period, without a sufficient excuse therefor, he may immediately institute his action for a breach of the contract, and recover not only the damages which then shall have accrued, but such as shall have developed themselves up to the time of the trial. *Martin v. Everett*, 375
3. If the maker of a note makes a partial payment thereon to the payee, which the latter agrees to indorse on the note, but instead of doing so, brings suit and recovers judgment for the full amount of the note, which is satisfied, the maker cannot maintain an action for the partial payment, but should have availed himself of it as a defence *pro tanto* to the suit of the payee against him. *Mitchell v. Sanford*, 695
4. Counts in debt for the statute penalties for extortion may be joined with one for money had and received, where the entire recovery goes to the party aggrieved. *Spence v. Thompson*, 746
5. On a statute providing the officer shall be liable in damages to the party aggrieved for four-fold the fees illegally received, an action of debt will lie. *Ib.* 746
6. It is only necessary in a count on the statute to alledge that certain sums other and higher than those allowed by law, amounting in all to a sum named, were illegally demanded and received by the defendant as an officer, under certain process. *Ib.* 746
7. The circumstance that illegal fees are collected by a succeeding sheriff as due to a preceding sheriff, and paid over to him, is no defence to the statute action for extortion. *Ib.* 746
8. Proof of the receipt of a less sum than stated in the allegation, will sustain it; and proof that *higher* fees were received than allowed by law, is equivalent to proof that *other* fees than the law allows were received.—*Ib.* 746

ACTION, AND ACTIONS QUI TAM—CONTINUED.

9. When money has been illegally exacted, no demand is necessary to enable the party to maintain an action for money had and received. *Ib.* 746
10. Where the assignee of a note simultaneously with the assignment, receives of a third person a note for the amount which he advanced for him, and which induced the assignment, it cannot be assumed that such note has been paid; but if it has, the assignee may still maintain an action against the assignor for the benefit of the party paying it. *Brown v. Isbell*, 1010
- See Account, 2.
- See Practice in Chancery, 21.

AMENDMENT.

1. The distinction in a judgment against a guardian, that it be levied of the goods and chattels, &c. of the ward in his hands, &c., is a mere clerical mispision, amendable on motion in the primary court, or in the supreme court, at the costs of the plaintiff in error. *Sellers v. Smith*. 264
2. A stranger to the proceeding cannot move to amend the return made by the sheriff, by striking out a levy made on a slave, upon the ground that it did not belong to any of the defendants in the execution, but was the property of the applicant. *Cawthorne v. Knight*, 268
3. Where a judgment in an action on a demand ascertained by writing is for more than principal and interest, it will be corrected in the primary court, on motion, or by the supreme court, at the cost of the plaintiff in error.—*Smith v. Robinson*, 271
4. And it is error upon such a showing to amend the judgment entry *nunc pro tunc*. The duty of the clerk is to enter the judgment according to the note, and if entered for more or less than the proper sum, it may be corrected, but if a credit is erased before judgment, the court cannot set up the erased credit. *Burt v. Hughes*, 571
- See Abatement, 5.

APPEALS AND CERTIORARI.

1. In an appeal cause, the judgment of a justice will not be reversed because the cause of action is not properly *indebitatus assumpsit*, when the action is for the violation of a contract, and the damages not excessive. *Cross v. Worrall*, 108
2. After an appeal is taken by the defendant from the judgment of a justice of the peace, the justice has no authority, even before he returns the papers, to receive the amount he adjudged to the plaintiff; yet if he receives it, and pays it to the plaintiff—the latter accepting it and directing the appeal to be returned, that he may recover the damages which the law gives in cases where the defendant's object was delay: by receiving the sum due

APPEALS AND CERTIORARI—CONTINUED.

- on the judgment, the plaintiff must be held to have waived all right to the damages—these being recovered as a consequence of a subsisting debt or demand. *Andress v. Longmire, Adm'r*, 166
3. *Quere?* Whether any individual can make himself a party against those asking the action of the commissioners of roads and revenue, in the matter of a public road. Also—whether even a *certiorari* can be sued out to set aside, or quash an order of this public nature, except in the name of the State *ex relatione*. *Moore v. Hancock*, 245
 4. Where it appears from the papers sent up by a justice of the peace to the circuit court, that three judgments had been rendered by him against a garnishee, and the condition of the appeal bond recites that an appeal was taken in “the three different cases,” but the transcript of the justice contains the papers in but one only, it cannot be intended that all the cases were consolidated by the justice. *Carter v. Pickard*, 673
 5. An appeal from a justice of the peace should not be quashed for a defect in the bond, unless the appellant, upon being required by the court, fails or refuses to execute a perfect one. *Ib.* 673
 6. A suit instituted before a justice of the peace and removed by appeal to the circuit or county court, is to be regarded as a case *at law*, and the unsuccessful party must be charged with all costs by the appellate court; unless the case shall come within the act of 1824, which provides that where the defendant appeals, and the plaintiff recovers less than the judgment of the justice, the appellate court may in its discretion give judgment against either party for the costs; or where a successful plaintiff appeals and recovers no more than was adjudged to him by the justice, he shall pay all costs. *Beason v. Riddle*, 743
- See Error, Writ of, 12.

ASSIGNMENTS.

1. An assignment by a rail road corporation actually insolvent, of all its estate for the security of certain bonds to be afterwards issued for the purpose of raising money to put a portion of the road in use, is not void *per se*, although it provides the estate shall be retained by the corporation until maturity of the bonds, and then sold in case of default for the benefit of the holders of the bonds, and afterwards of its creditors generally, who shall prove their demands, &c.; but the deed is inoperative as a security unless the bonds are actually issued to *bona fide* creditors before the lien of other creditors attach, or the property conveyed either by judgment or execution, as the estate is real or personal. *Allen, et al. v. Montgomery R. R. Co. et al.* 438
2. The circumstance that the corporation is actually insolvent at the time of making such a deed, and that all the estate conveyed by it is afterwards

ASSIGNMENTS—CONTINUED.

- sold in a lump by the trustee, and does not produce a sum sufficient to pay the bond-holders, is not sufficient proof of fraud to avoid the deed; nor does the fact that the deed reserves the property from sale, prevent any execution creditor from selling the reversionary interest of the corporation at any time previous to the law day of the deed. *Ib.* 438
3. A deed reciting that the grantor is unable to pay all his debts, and conveying certain slaves to a trustee to pay a preferred creditor, at the expiration of two months from the date of the deed, and also providing the slaves shall remain with the trustee, is not void *per se*, because it also provides, that the residue remaining after paying the preferred debt shall be paid to the grantor. *Hindman v. Dill & Co.* 689
4. The general assignee of a debtor—no consideration passing at the time of the assignment, or rights given up—is not a *bona fide* purchaser without notice, but the property conveyed is held by them in the same condition as by the debtor. *Frow & Ferguson v. Downman,* 880
5. An assignment by a debtor of all his estate and effects to trustees for the benefit of his creditors, operates as a quit claim of the assignor's interest in the same plight and condition as he himself held the property conveyed, and will not defeat pre-existing liens; nor can the trustees be regarded as purchasers, or the *cestui's que trust* creditors within the registry acts.—*Walker, et al. v. Miller & Co.* 1067
- See Evidence, 45.

ASSUMPSIT.

1. An action for money had and received, may be maintained if the principal elects to consider it a payment. *Cameron, Ex'r, v. Clarke, Smith & Co.* 259
2. A promise to divide the rent of certain lands for the year 1843, and until the determination of a named suit, induced by the undertaking of the promisee to produce evidence on the trial of a suit in chancery, showing the failure of consideration of certain notes, will enable the promisee to maintain *indebitatus assumpsit* on showing the receipt of notes. *Walke v. McGehee,* 273
3. The act of 1807 declares void all promises, &c. by which parties stipulate to pay to each other, money or other thing of value upon the event of a horse race, or other description of gaming; consequently, where money thus wagered is deposited with a stakeholder, it may be reclaimed by either party before it is paid over, by a notice not to pay it; and it is not necessary to entitle the party giving notice to maintain an action against a stakeholder, where the latter afterwards paid it to the supposed winner.—*Ivey v. Phifer,* 535
4. The right to a franchise may be tried by an action of assumpsit for money had and received, by one usurping the franchise and collecting the tolls. *Murphy v. The City Council of Montgomery,* 586

ASSUMPSIT—CONTINUED:

5. A parol executory contract for the sale of land cannot be enforced at law; but where the contract is executed by a conveyance of the land, assumpsit will lie for the purchase money. *Butler v. Lee*, 885
6. The action cannot be maintained, if the conveyance is not made until after the action is commenced. *Ib.* 885
7. The indorser of a bill pays a judgment against himself on his indorsement, and takes from the holder an assignment of a separate judgment against the acceptor; afterwards it is ascertained in a suit in chancery between the holder and the acceptor, that the latter is entitled to a credit on the judgment against himself for \$968 72, which decree is in full force: to the extent to which the judgment against the acceptor is made unavailable by the acts or omissions of the holder, the latter is liable to the indorser in an action for money had and received. *Knox v. Abercrombie*, 997
See Gaming, 5.

ATTACHMENT.

1. The right conferred on the bank of suing out an attachment in the county of its location, is a privilege conferred on it, and does not abridge the power it previously possessed, of suing out attachments in the county of the residence of the defendant. *Pearson, et al. v. Gayle*, 278
2. If an attachment is wrongfully sued out, the plaintiff is responsible to the extent of the actual injury, but if vexatiously sued out, the case is one for vindictive damages, only in the event that the plaintiff has wantonly or maliciously resorted to the process. *McCullough, et al. v. Walton*, 492
3. A non-resident cannot sue out an attachment against the property of a deceased non-resident debtor. *Hemingway v. Moore and Crenshaw*, 645
4. An action may be commenced by attachment, to recover for a breach of warranty, of the soundness of a slave. *Weaver v. Puryear & Williamson*, 941
5. It is competent for the plaintiff, under the act of 1837, to sue out an ancillary attachment, not only where a suit is commenced by summons or *capias ad respondendum*, but where an original attachment is the leading process in the cause; yet it would perhaps be proper to quash the ancillary attachment, or the levy thereof, where the estate of the defendant levied on under the original, was unquestionably ample to satisfy the plaintiff's demand. *Brown v. Isbell*, 1009
See Abatement, 1.
See Pleading, 11.
See Sheriff and his Sureties, 1.

ATTORNEY IN FACT.

See Judgment and Decree, 1.

ATTORNEY AT LAW.

1. An attorney who had a note for collection, and received payment in slaves may be sued on a parol promise to pay his principal; it not being within the statute of frauds. *Cameron, Ex'r, v. Clark, Smith & Co.* 259
2. An action for money had and received may be maintained if the principal elects to consider it a payment. *Ib.* 259
3. Where an attorney charges himself with an amount collected for his principal, and charges the principal with his fee, the jury may infer a promise from the attorney to pay the balance. *Ib.* 259
4. The admission by the attorney of record of a fact for the purpose of trial, binds his client, and is conclusive of the fact admitted. *Starke & Moore v. Kenan,* 818

BAILOR AND BAILEE.

1. The bailee of a sheriff, to whom the property of a third person is delivered upon a contract to return it at the sale day, has such a property in the thing bailed as will authorise him to sue a wrong doer, for depriving him of the possession. *Cox v. Easley, et al.* 363

BANKRUPT, ASSIGNEE IN BANKRUPTCY, &c.

1. An assignee in bankruptcy cannot sue in the State or federal courts, after the lapse of two years from the time of the declaration and decree in bankruptcy, if the cause of action had then accrued, to recover the property of the bankrupt. *Comegys v. McCord,* 932
2. The bankrupt act of 1841, in virtue of the decree of bankruptcy, divests the bankrupt of all property and rights of property, except as therein provided, and declares that all suits pending to which he is a party shall be prosecuted or defended by the assignee to their final conclusion, in the same way, and with the same effect, as they might have been by the bankrupt himself: consequently, the assignee must be made a party to the litigation which may be pending in favor of, or against the bankrupt, or it cannot progress to a trial. *Lacy, Terrell & Co. v. Rockett,* 1002
3. The assignee in bankruptcy may be made a party by motion, or perhaps by *scire facias* to a suit in which the bankrupt was a party when he was declared such. And perhaps where the assignee in a proper case fails to come in as a plaintiff, the defendant may suggest the plaintiff's bankruptcy, and upon the production of the decree, the court may order the assignee to make himself a party within a limited time, and in default thereof, the suit to abate for want of prosecution: but however this may be where the fact of bankruptcy is not controverted, it is competent for the defendant to plead *in bar* to an action by the *bankrupt himself*, the decree declaring the plaintiff to be a bankrupt. The effect of this plea may be avoided by the assignee's making himself a party; but if he replies, and the issue is found against him, or he demurs and his demurrer

BANKRUPT, ASSIGNEE IN BANKRUPTCY, &c.—CONTINUED.

- is overruled, and he does not plead further, judgment will be rendered for the defendant. *Ib.* 1002
4. A plea by the defendant that the plaintiff was declared a bankrupt *pendente lite* need not alledge any thing in respect to the jurisdiction of the court in which the proceedings in bankruptcy were had; for it will be intended that these were in the proper tribunal. *Ib.* 1002
5. *Quere.* Is it not a good plea that some of the plaintiffs, all of whom were a partnership, were declared bankrupts *pendente lite*? *Ib.* 1002

BANK COMMISSIONERS.

1. The Bank Commissioners appointed under the act of 1846, whether by the legislature, or by the executive to fill a vacancy, are public officers, of whom all courts will take judicial notice. *Colgin v. The State Bank*, 222

BANK DIRECTORS, &c.

1. In a proceeding by notice and motion, at the suit of a bank against its debtor, if no issue is made up, and a verdict returned for the plaintiff, it is not necessary that the judgment should affirm, with particularity, the proof of every fact which was necessary to have authorized their verdict; it is enough if it distinctly sets forth the facts, which are essential to the exercise of the summary jurisdiction. *Riggs, et al. v. The Bank of the State*, 183
2. Directors of a bank are not responsible for an injury to the bank, caused by their act, originating in an error of judgment, unless the act be so grossly wrong as to warrant the imputation of fraud, or the want of the necessary knowledge for the performance of the duty assumed by them, on accepting the agency. *Godbold v. The Branch Bank of Mobile*, 191
3. The giving compensation to a member of the board of directors, for *extra* services as an agent of the bank, though unlawful, is not such an act as will expose the directory to liability, if done in good faith, and with the honest intent of benefitting the bank. *Ib.* 191
4. An indorsement on the note, of the sum for which it was discounted, and the date of the discount, is an admission on the part of the bank, of the sum lent upon the note, of which the defendant may avail himself, as otherwise the inference would be, that the bank was entitled to recover the entire amount. *Colgin v. The State Bank*, 222
5. The right conferred on the bank, of suing out an attachment in the county of its location, is a privilege conferred on it, and does not abridge the power it previously possessed, of suing out attachments in the county of the residence of the defendant. *Pearson, et al. v. Gayle*, 278
6. Since the act of December, 1841, a note payable to the *cashier* of a bank may be sued on in the name of the corporation. *Caldwell v. Branch Bank at Mobile*, 549
- See Contracts and Agreements, 3.

BANK DIRECTORS, &c.—CONTINUED.

- See Intent, 1.
 See Intendments and Legal Presumptions, 3.
 See Notice, 1.
 See Witness, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A bill of exchange payable twelve months after date, when the nominal day of payment falls on Sunday, is notwithstanding allowed three days of grace, and is properly protestable on the Wednesday following. *Wooley v. Clements*, 220
2. Where a note is given on a consideration moving entirely from a third person to one assuming to act for him, any defence of the maker against the party in interest is admissible, where no interest in the note is disclosed by the person to whom it is made. *McClure v. Litchfield*, 337
3. When a note is given to one assuming to act for another, for a debt already owing, and the agreement is that it shall remain with a third person until the concurrence of the creditor is obtained, an attachment afterwards levied, upon such concurrence, will authorize the maker to resist the payment, on showing satisfaction of the judgment on the garnishee process. *Ib.* 337
4. An innocent holder, for value, of an acceptance, improperly made by a member of a firm, by his indorsement of the bill, transfers all his rights to his indorsee, who will not therefore be required to show when he acquired the bill, or that he gave value for it. *Pearson v. Howe*, 370
5. A gratuitous agreement by the holder of a bill with the acceptor, made on the last day of grace, to look to him alone for the payment, and not to present the bill, or notify the drawer, does not relieve the drawer if the protest is made and notice given. *De Witt v. Bigelow & Co.* 480
6. A bill drawn within, and payable within this State, nine months after sight, is payable nine months after it is presented for sight, and is entitled to days of grace. *Brown v. Turner*, 752
7. Notice of the dishonor of a bill, payable on the 12th November, in Mobile, given on the 27th of the month to the drawer, in Washington county, is insufficient to charge him, unless some satisfactory excuse is made for such long delay. *Ib.* 752
8. Where suspicion is cast upon a mercantile security, the holder must prove that he gave a valuable consideration for it, and acquired it before it was dishonored. *Boyd & Macon v. McIvor*, 822
9. H. being indebted to D. & Co., procured S. who was indebted to him, to draw a bill in his favor, on D. & Co., which he indorsed to them, and which they received in payment of the debt of H.—Held, that S. was not entitled

BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTINUED.

to notice of the dishonor of the bill, (no funds being provided for its payment.) *Stewart v. Desha, Sheppard & Co.* 844

See Court, Charge of, 7.

See Evidence, 12, 31.

See Indorsement, 2, 3.

See Notary Public, Protest, &c. 1, 2.

CHANCERY.

1. A decree in Chancery, though in form final, which is in its nature interlocutory merely, cannot be pleaded in bar of another action. *McLane v. Spence, Adm'r,* 172
2. When by mistake a written agreement expresses more or less than the parties intended, a court of equity will reform it, but the proof of the mistake must be full and satisfactory. *Clopton v. Martin,* 187
3. When in the sale of a slave it was agreed the purchaser should have no warranty of soundness, and he was informed the slave had been some years before afflicted with fits, but no bill of sale was then executed—the parties agreeing that it should be so on a certain day when the price was to be paid—and the seller afterwards caused a receipt to be drawn expressing a warranty of the then soundness of the slave under the impression this would not bind him if the slave should afterwards be afflicted in a similar manner: Held, that a case of mistake was made out sufficient to warrant the cancellation of this clause of warranty. *Ib.* 187
4. The bill charges with particularity, that L. who is insolvent, claims certain lands as the purchaser at an irregular sale of a tax collector, whose deed he has, that L. was threatening to commit trespasses and waste on the premises, that himself and others, acting avowedly under his authority, are making preparations with a view to their commission, that the complainants have been disturbed in the enjoyment of their property, and are likely to be more seriously interrupted: Further, that the complainants are thus prevented from making the profit from their estate which otherwise they would, and its value in market is lessened. Held, that it was competent for chancery in such a case, to grant an injunction to stay the commission of trespass and waste; that as the deed threw a cloud over complainants' title, that court might remove the cloud, and direct the cancellation of the deed; especially where the deed, in point of form, was *prima facie valid.* *Lyon, et al. v. Hunt, et al.* 295
5. Where a bill charges that the defendant, or a person under whom he claims, failed to perform some legal act, indispensable to the validity of his title, in a manner conformable to law, an affirmation by the defendant in his answer, that the act was regularly performed, without stating with particularity the mode of performance, is not such a denial as requires the

CHANCERY— CONTINUED.

- testimony of two witnesses, or one witness and strong circumstances to overbalance it. *Ib.* 295
6. Upon a bill charging a contract for a purchase of land, alledging the payment of the purchase money, and praying that the title to the land may be vested in the vendee or his heirs, the court is not authorized to render a decree in favor of the complainants; although it is alledged that the defendant fraudulently refuses to comply with his contract; and in addition to the special prayer, there is a prayer for general relief. *Strange, et al. v. Watson,* 325
7. By an agreement between the vendor of land and the administrators of the vendee, a contract of sale between the former and the intestate was rescinded after one of several notes for the purchase money was paid, and the unpaid notes were delivered to the administrators: Held, that the heirs of the intestate could not compel the vendor, by suit in equity, to perfect their title, unless they would pay the residue of the purchase money—the vendor asserting that upon such payment he would perform his contract with their ancestor. *Ib.* 325
8. But as to such stockholders who are not in default to the corporation by reason of no call having been made, but whose subscriptions to the capital stock have not been paid, a court of equity has jurisdiction to compel payment at the instance of an execution creditor of the corporation. *Allen, et al. v. Montgomery R. R. Co. et al.* 437
9. A creditor cannot insist that a mortgage is void for the omission to register it, unless this ground is alledged in the bill—if alledged, the defendant has the right to reply notice to the creditor. *Ib.* 438
10. Upon a bill by the father to recover of his son-in-law certain property upon the allegation that it was sent with his daughter as a loan, if the father fails to sustain his case, the bill will not be retained to inquire whether the issue of the daughter who is dead, has any interest in the property. *Hooe v. Harrison,* 499
11. Chancery will not interfere, when injustice would be done to an innocent person. *Reynolds v. Dothard, et al.* 531
12. The answer of one partner, on behalf of the firm, is sufficient, where the members of the firm are not charged with personal knowledge of the facts. *Ib.* 531
13. A court of equity has no jurisdiction to decide on the validity of a will, either of personal or real estate, at the instance of the heir at law. *Watson, et al. v. Bothwell, et al.* 650
14. The allegation that the complainants have just cause to fear, and do fear the defendants will remove certain property bequeathed by a will alledged to be void, will not confer jurisdiction on a court of equity in the absence of allegations that the complainants have applied or intend to apply for letters of administration on the estate. *Ib.* 650

CHANCERY—CONTINUED.

15. The mere circumstance that the devisee under such a will has possession of the title deeds for lands of the testator, will not warrant the heir at law in filing a bill to have them delivered to him. *Ib.* 650
16. The mere circumstance that one loaning money takes a note payable to a married woman in trust for himself, will not give jurisdiction to a court of equity of a suit by his executor against the debtor and the husband and wife—there being no allegation in the bill that husband or wife interpose any impediments to a recovery at law by suit in their name. *Rowland, et al. v. Logan,* 663
17. In the case of a non-resident, a decree *pro confesso* is an admission of the truth of the allegations of the bill. *Butler v. Butler,* 668
18. The failure to execute the bond, which the law requires, when a decree is rendered against a non-resident, is error. *Ib.* 668
19. A bill may be exhibited in the county where a defendant resides, though that is not the county in which the judgment sought to be enjoined was rendered. *Ib.* 668
20. A garnishee who had discharged the judgment, being sued on the original debt for the use of another, employed as counsel to defend the suit, the same attorneys who had obtained the judgment against him as garnishee, but did not inform them of his defence, in consequence of which a second judgment was rendered against him for the same debt: Held, that this was gross negligence, and that chancery could not relieve him. *Sanders v. Fisher & Phelps,* 812
21. Where one partner is bound to attend personally to the business of the firm, and afterwards becomes infirm in mind by reason of intemperance, a court of equity will not be authorized to set aside an agreement then made for the dissolution of the concern, on the ground of fraud and imposition, when that is to be inferred only from the fact that profits have been realized when loss was anticipated. *Atwood v. Smith,* 894
22. It is no ground for the interference of a court of chancery, that slaves administered upon in the State of Tennessee, are brought to this State, by the widow of the deceased, under a claim of title, with the consent of the administrator, unless the orphans' court should refuse the temporary letters of administration which the statute authorizes to be granted in such a case. *Robinson, et al. v. Robinson,* 947
23. The allegations of a bill, being, that an administratrix in South-Carolina, had purchased a number of the slaves of the estate, with the assets of the estate, and converted them to her own use, bringing them to this state, and afterwards conveying them by deed of gift to two of her children, and praying an account of them, as assets of the estate, &c., and the proof being, that by the purchase, the administratrix bought only what she considered her own interest, and that of two of her minor children in the estate—that she paid no money, but executed her own note to her co-adminis-

CHANCERY—CONTINUED.

- trator for the amount—Held, that the proof did not sustain the allegations of the bill—Further, that there was nothing, shown upon the bill, to give a court of chancery of this state, jurisdiction. *Julian and Wife v. Reynolds*, 960
24. When a trustee in a deed of trust, refuses to make the affidavit, and take the steps necessary to a trial of the right of property, the *cestui que trust* may resort to a court of chancery to have the trust enforced. *Robinson & Caldwell v. Mauldin, &c.* 978
25. A judgment creditor may resort to a court of equity not only to subject the equitable interests of his debtor, but for the purpose of removing impediments to the sale at its value, of an estate which may be reached by a *fiery facias*. *Dargan v. Waring, et al.* 988
26. The indorsement of a note which, upon its face is payable to one person for the use of another, cannot impart to the indorsee a right to receive the money due thereon, for his own benefit; but the indorsement is a breach of trust on the part of the payee, which entitles the *cestui que trust* to assert his right to the proceeds of the note, in a court of equity. *Eldridge v. Turner*, 1049
27. M. & Co. indorsed for W. certain notes which the latter gave in part payment of a steamboat, and to indemnify the indorsers against liability, W. executed to them a mortgage on the boat, stipulating to have the boat insured and assign the policy to the mortgagees; W. afterwards being in failing circumstances, made an assignment of all his estate and effects (including the boat) to C. &c.; M. & Co. filed a bill against W., his assignees and others, alledging the assignment, the insolvency of W., his failure to insure, and assign the policy: *Further*, that the assignees deny their right as mortgagees, claim under the assignment an exclusive right to the boat to enable them to execute their trust, avow their purpose to employ and sell it irrespective of the complainants lien. It is also alledged that the assignees are unable to make good a loss resulting from its destruction, or condemnation to satisfy the demands of persons furnishing supplies, &c: *Held*, that the case stated in the bill, authorized the interposition of chancery, so as to make the boat subservient to the complainant's lien, upon the principle *quia timet*; and this although neither of the notes was due. *Walker, et al. v. Miller & Co.* 1067
28. A mortgage was executed of a steam-boat to indemnify the mortgagees as indorsers of certain promissory notes, which authorised the mortgagees to take possession of the boat if the notes were not paid as they matured, and stipulated further; that the boat should not leave the waters of the Mobile bay, and that the mortgagors would cause her to be insured and assign the policy to the mortgagees. A bill *quia timet* was filed by the mortgagees against the mortgagor and his assignees, who had obtained the possession of the boat, which was heard before the notes became due: *Held*,

CHANCECY—CONTINUED.

that the decree should require the assignees to enter into bond with sureties to keep the boat in good repair—not to remove her from the waters of the Mobile bay—to cause her to be insured and assign the the policy, and until this was done they and their sureties should stand as insurers. *Further*, if the notes should not be paid as agreed, then, they would deliver the boat to the mortgagees free from the liens of material men, &c. If such a bond should not be given, the decree might direct a sale of the boat by the sheriff, &c., for the purpose of preserving the fund until the debt matured, or conflicting liens were adjusted. *Ib.* 1067

See Corporation, 1.

See Debtor and Creditor, 3, 4, 6.

See Dedication of Property, &c, 6.

See Ejectment, and Trespass to Try Title, 1.

See Husband and Wife, 3, 10.

See Lien, 1, 2, 3.

See Partners and Partnership, 1.

See Pleading, 22.

See Practice in Chancery, 7, 23, 25, 26.

See Principal and Surety, 3.

CLERKS AND THEIR DEPUTIES.

1. A deputy clerk is authorised to take and certify the acknowledgement of a deed, so as to warrant its registration. *Pinkard v. Ingersol, at al.* 9
2. When the clerk, pursuant to an order of the court, that a bond to be approved by him should be filed within ninety days, receives a bond within the time, and endorses it, *filed in office*, he cannot afterwards be permitted to testify, that he did not approve or disapprove it. *Pearson, et al. v. Gayle,* 278
3. A deputy clerk, in the absence of the principal, may do any act he could do if present. His appointment need not be in writing. *Stewart v. Desha, Sheppard & Co.* 844

CONFLICT OF LAWS.

1. A citizen does not lose his political rights by residence in a foreign country, nor does the continued residence of a woman in a foreign state, after the death of her husband, authorise the inference that she has become entitled to its political privileges. Whether a citizen of the United States can throw off his allegiance without the consent of his government—*Quere.*—*Beavers & Jamison v. Smith,* 20
2. *Quere*—Can a guardian appointed in one state, maintain an action in another state, for a cause in which the ward is interested?—*Cox v. Williamson,* 343

CONFLICT OF LAWS—CONTINUED.

3. Under the Spanish law in force in a portion of this state previous to its acquisition from France, the husband could make a valid sale of the paraphernal estate of the wife with her consent, and her joining in the deed is evidence of such consent, although that is not executed with the formalities required to a public act. The deed is binding on the parties and their heirs as a private act. *Heirs of McVoy v. Hallett and Walker*, 864
4. One effect of extending the laws of the Mississippi territory over the country so acquired was, to introduce the common law mode of proving deeds, by proving the signatures of subscribing witnesses where the grantor is dead—as well as allow the probate and registration of deeds previously executed under the statute laws then in force. *Ib.* 864
5. As a general rule, the party claiming a benefit from a foreign law, must prove its existence; but when the laws of one State or nation are operative in another, this rule does not apply. The courts of this country will therefore judicially notice the laws of Spain, which regulated the conveyance of real property in Mobile and the country adjacent, when the territory was subject to the dominion of that nation; and under the influence of this principle, are bound to know what documentary evidence of title were records of the Province, so as to allow copies to be admitted as evidence. *Doe ex dem Farmer's Heirs v. Eslava*, 1029

CONSIDERATION.

- 1 A promise to divide the rent of certain lands for the year 1843, and until the determination of a named suit, induced by the undertaking of the promisee to produce evidence on the trial of a suit in chancery, showing the failure of consideration of certain notes, will enable the promisee to maintain *indebitatus assumpsit* on showing the receipt of notes. *Walke v. McGehee*, 273
 2. In a suit against the promisor in such a contract, it is not incumbent on the plaintiff to show any performance of his undertaking, the promise to perform being a sufficient consideration to sustain the contract. *Ib.* 273
 3. Where suspicion is cast upon a mercantile security, the holder must prove that he gave a valuable consideration for it, and acquired it before it was dishonored. *Boyd & Macon v. McIvor*, 822
 4. A party may prove that the note sued on, was given in consideration of the purchase of a brick-yard, and that the vendor agreed in consideration of the sale, not to make bricks in the town of Cahawba. *Comelanderv. Bird*, 913
- See Dower, 6.
 See Evidence, 39, 54.
 See Frauds, 3.
 See Husband and Wife, 5.
 See Indian and Indian Tribes, 1.
 See Vendor and Vendee, 2.

CONSTITUTIONAL LAW.

See Garnishment and Garnishee, 6.

CONTRACTS AND AGREEMENTS.

1. There is no distinction between the capacity required to make different kinds of contracts. A legal capacity to make any contract, is a capacity to make all contracts. *Hale, et al. v. Brown*, 87
2. When property is obtained without any, or for a grossly inadequate consideration, by a pre-concerted plan to effect the particular design by representing worthless things of value, it is not necessary for the injured party to offer to return the worthless thing, before his right of recaption attaches. *Mahone v. Reeves*, 345
3. A bank note being passed off upon an agreement to take it back if not current, the person receiving it may recover, if it was uncurrent, although he had passed it off, had been sued for passing it as a current note, and had recovered a judgment; after which, and whilst the judgment was still in force in his favor, he took back the note, and brought suit against the person passing it to him. *Rodgers v. Russell*, 456
4. Where a party subscribes a paper, stipulating to pay a certain sum of money, if a bridge (which was to be let out and built according to a plan to be adopted by certain commissioners,) should be completed by a day designated, and reported by the commissinners to be done and finished according to contract, to make his undertaking absolute, it should at least appear that the work was completed according to the contract, or so reported by a majority of the commissioners; and the mere indorsement on the contract signed by a majority, that the bridge had been received, is not sufficient, where it appears that the builder had not complied with his contract. *Caldwell v. Harrison*, 756
5. Where a contract by which personal property was sold and conveyed by husband and wife is rescinded, in the absence of all proof to the contrary, the parties will be considered as placed *in statu quo*. *Gamble v. Gamble's Adm'r*, 966
6. A conveyance of "fifty thousand pounds of cotton, to be produced during the present year, upon the plantation of the party of the first part, in the county of Marengo, the said cotton to be the first cotton which may be gathered from the crop of cotton now planted and growing upon the said plantation, and to be neatly ginned and packed in good bales, ready for market," is a conveyance of 50,000 lbs. of ginned, or cleaned cotton. The terms "first cotton which may be gathered," means of the early, in contradistinction to the late gathering; and therefore when ninety-one bales of the early gathering were ginned and baled, the *lien* attached, although there was then in its crude state, a quantity of cotton not separated from the seed, gathered earlier in the season, than that which composed the ninety-one bales. *Robinson & Caldwell v. Mauldin, Montague & Co.* 977

CONTRACTS AND AGREEMENTS—CONTINUED.

7. Where one person proposes to sell property to another, and as an inducement to purchase, offers to take the vendee's note for the price, *payable to the vendor for the use and benefit of an infant son of vendee*, and to hold the money for the *cestui que trust*; if the vendee accedes to the offer and gives a note in the form proposed, the contract will be obligatory upon the parties, and the payee will be regarded as a trustee for the son.—*Eldridge, and another, v. Turner, by his next friend, &c.* 1049
 See Action, 2.
 See Bills of Exchange and Promissory Notes, 2, 3.
 See Chancery, 2, 21.
 See Damages, 1.
 See Deeds of Trust, and Trust, 1.
 See Overseer and his Employer, 1.
 See Pleading, 22.
 See Set-off, 6.

CONTRIBUTION.

- See Principal and Surety, 10, 11, 17.

CORPORATION.

1. When stockholders in a corporation, after calls regularly made, are in default, a judgment creditor has a complete remedy at law against them, and therefore will not, for this cause only, be allowed to proceed in equity.—*Allen, et al. v. Montgomery R. R. Co.* 437
2. But as to such stockholders who are not in default to the corporation by reason of no call having been made, but whose subscriptions to the capital stock have not been paid, a court of equity has jurisdiction to compel payment at the instance of an execution creditor of the corporation. *Ib.* 437
3. When a corporation has provided under the terms of its charter to forfeit stock partially paid out, this dissolves the connection of the stockholders when shares are forfeited with the corporation, and a creditor cannot charge them with the amount unpaid. *Ib.* 437
4. When stock partially paid for or transferred by the stockholder *bona fide* to another person, and he is accepted by the corporation as the holder of the stock, this is a discharge of the original stockholder, and he cannot afterwards be pursued by a creditor. *Ib.* 437
5. Although a corporation by a special provision in its charter is empowered to mortgage its effects, &c. for a particular purpose, this will not be construed as taking away or abridging its general power to execute a mortgage for the security of creditors. *Ib.* 438
6. The circumstance that purchasers of the effects of a corporation have

CORPORATION—CONTINUED.

- surrendered them to another corporation created with the same or similar powers, does not by itself warrant the inference of an agreement before the sale thus to convey it. *Ib.* 438
7. It seems that a statute which merely gives a remedy at law, where it could previously have been available in equity only, or *vice versa*, may consistently with the constitution operate retrospectively; but whether the act of 1841, which gives the remedy by garnishment to the creditor of a corporation against a stockholder, where the latter stipulates to pay his subscription for stock as calls are made for it, entitles the creditor to garnishee the stockholder for what is due for the unpaid stock where he has paid all the calls of the company, is an open question. *Paschall v. Whitsett*, 472
8. A corporation is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and non-user; and a stockholder of a corporation is not liable to the process of garnishment under the act of 1841, at the suit of its creditor after the dissolution of the corporate body. *Ib.* 472
- 9 The act of 1829, incorporating the Montgomery Wharf and Steamboat Company, did not confer any proprietary rights on the company, but merely authorized them to exact tolls on the landing of goods at their wharf.—*Murphy v. The City Council of Montgomery*, 586
10. The city of Montgomery, as an incident of its rights of property in a wharf, may collect toll or wharfage from those landing there, but from the interest the public have in the matter, the toll may be regulated by law. *Ib.* 586
11. The right to a franchise may be tried by an action of assumpsit for money had and received, by one usurping the franchise and collecting the tolls. *Ib.* 586
- See Assignment, 1, 2.
- See Executors and Administrators, 20.
- See Practice in Chancery, 7.

COSTS, AND SECURITY FOR.

1. Where no obstacle is thrown in the widow's way in the recovery of dower, she is not entitled to costs. *Beavers & Jemison v. Smith*, 21
2. The act of 1807, which declares that the unsuccessful party shall be liable for the costs, applies to all cases at law in which the plaintiff fails, whether the suit is instituted in the ordinary form, or whether the court in which redress is sought has jurisdiction or not. *Westmoreland v. Hale*, 122
3. The defendant is entitled to costs upon a judgment abating the suit. *Massey v. Steele's adm'r*, 340
4. A proceeding in which the right of property is to be tried as provided by statute, is a *suit* or *action*, within the meaning of the acts which authorize

COSTS, AND SECURITY FOR— CONTINUED.

- the dismissal of a *suit* or *action*, if security for costs is not given when required by a non-resident plaintiff; and if non-resident plaintiffs in execution fail to give such security upon a requisition duly made, it is competent for the court to dismiss the levy at their costs. *Jacott, &c. v. Hobson*, 434
5. The circumstance that the plaintiff has been condemned in the costs of one term, as the condition of a continuance, does not make the judgment against the defendant irregular, if costs are adjudged against him at the final determination of the suit. *De Witt v. Bigelow*, 480
 6. It is irregular to tax an attorney's fee and the county tax upon a judgment *nisi* on a recognizance, when the judgment is afterwards at the same term set aside on condition that all costs shall be paid. *Weissinger v. The State*, 540
 7. A writ of error will lie against the State on the refusal of the court to strike out improper items in the bill of costs in a State case, and the State is a proper party. *Ib.* 540
 8. The costs of the suit against the principal debtor do not constitute any part of the costs against the garnishee, but become part of the debt, and as such, are recoverable if the garnishee is indebted a sufficient sum to cover them as well as the principal debt. *Locket v. Child*, 640
 9. *Quere.* Are not the acts of 1807 and 1811, which authorise a defendant to require a non-resident plaintiff to give security for costs, to be construed *in pari materia*, as parts of an entire system, and is not the same notice necessary to be given under the latter as under the former enactment? *Claiborne v. Harris*, 647
 10. A note made by the judge on his docket, stating the plaintiff was shown to be a non-resident, and that he give security for the costs before the next term, or the cause be dismissed, is merely directory to the clerk, and from it he may complete his minutes; yet it is not in itself a notice to the defendant of the requisition for security. But if the entry is perfected by being transferred to the minutes of the court in proper form, it is a sufficient compliance with the statute. *Ib.* 647
 11. Objections that the costs are too large, must be made in the court below, and cannot be raised for the first time in this court. *Faulkner v. Chandler*, 725
 12. An objection to the admissibility of an entire record, will not authorize the objector to raise a question in this court, relating to costs alone. *Ib.* 725
 13. Where the successful party is improperly charged with the costs, though he objected to such a judgment, the error is not a mere clerical misprision, amendable on motion in the court rendering the judgment, or in the supreme court at the costs of the plaintiff in error; but is a ground for the reversal of the judgment. *Beason v. Riddle*, 743
- See Appeals and Certiorari, 6.
See Estrays, 1.

COURT, CHARGE OF.

1. When there is evidence from which the jury may infer the party was the victim of a pre-concerted plan, it is no error to instruct the jury they must find, for the defendant, if they believe a fraud is committed. *Mahone v. Reeves*, 345
2. A party has no right to ask a new, and substantive charge to the jury, on their returning into court for an explanation of the charge previously given, or for the purpose of having it again repeated. *Prosser v. Henderson*, 484
3. Where a party prays a charge appropriate to the evidence and conformable to law, it should be given, and its refusal cannot be excused by giving other charges of equivalent import. *Ivey v. Phifer*, 535
4. The jury are the judges of what facts are proved, yet it is competent for the court to charge hypothetically, or to say what the evidence establishes, if they find it to be true. *Ib.* 535
5. When the question raised on the evidence is the breach of a warranty, a charge in reference to the law arising out of a fraud is abstract. *Milton v. Rowland*, 733
6. The court cannot instruct the jury as to the effect of evidence, which is doubtful or contradictory. *Boyd & Macon v. McIvor*, 822
7. In an action on a bill of exchange against the drawer, the court charged the jury, "that the bill of exchange which had been read to them, and the certificate thus admitted, was testimony for them to consider, as evidence of the protest of said bill, and notice to the defendant:" *Held*, that as the protest was admissible evidence, though perhaps insufficient in itself, the charge was not erroneous, that if the defendant desired other, or explanatory instructions, he should have prayed the court to give them, and charge the jury explicitly as to the effect of the evidence. *Leigh & Co. v. Lightfoot*, 935
8. Where a prayer for instructions to the jury, is predicated of evidence not before them, it should be denied. *Brown v. Isbell*, 1010
9. Where there is testimony tending to establish a particular result, a prayer for instructions affirming an admitted legal proposition, and which involves the consideration of this testimony, cannot be denied, on the ground that it is abstract, because the evidence is not such as should convince the jury. *Clealand v. Walker*, 1059
10. Where a charge conforms to the law, and is authorized by the evidence, it should be given in the terms in which it is asked, though it may be necessary for the court to give additional or explanatory instructions; and the error of a refusal, cannot be repaired by giving another charge, which when critically examined, will be found to lay down *substantially* the same principle. *Ib.* 1059

COURT, ORPHANS.

1. the effect of the decree of insolvency, is to transfer to the orphans' court

COURT, ORPHANS'—CONTINUED.

- the exclusive jurisdiction of all claims against the estate, and in that court on the final settlement, it may be shown that the administrator has withheld or wasted the assets. Whether equity might not afford relief in certain cases—*Quere? Edwards v. Gibbs*, 292
2. *Quere*—Whether under the statute when a guardian, &c. has removed from the State, the orphans' court can proceed to decree the account stated by it at the same term when it is stated; or whether the guardian, &c. is not then to be cited to a final settlement as in other cases. *Seight v. Knight*, 461
3. The orphans' court, under the act of 1835, has no jurisdiction to assign dower unless of lands of which the husband died seized. *Nance v. Hooper*, 552
4. The parties in whose favor executions are required to be issued by the act of 1830, on a decree of the orphans' court, for the final settlement of the accounts of executors, administrators and guardians, are upon the return of "no [property found]," entitled to executions *in their own names* against the sureties of the defendant in the decree. *Cawthorn v. Knight*, 579
5. The orphans' court has the power to establish the contents of a will, which has been destroyed, without the knowledge or consent of the testator, by the proof of a substantial copy of the will. *McBeth v. McBeth*, 596
6. If the will is not destroyed, but is in the possession of any one subject to the jurisdiction of the court, it should compel its production. *Ib.* 596
7. The statute which directs that commissioners shall be appointed within three months after the estate of an intestate has been reported solvent, to make distribution of the same, is not imperative on the orphans court.—*Reynolds' Adm'r v. Reynolds' Distributees*, 1023
8. The orphans' court has no authority to impanel a jury to ascertain a disputed fact, save only where there is a contest about a will, and one or two other special cases: unless there is a doubt in relation to the controverted fact, which requires a cross-examination to elicit the truth. And in a case not coming within the exception, the necessity for a jury must appear on the record, by setting out the testimony, so as to enable an appellate court to revise the order directing a jury to be impanelled. *Ib.* 1023
- See Action, 1.
- See Error, Writ of, 21.
- See Executors and Administrators, 21.
- See Guardian and Ward, 10, 11, 12.
- See Practice in Chancery, 17.

COVENANT.

1. G. having purchased from his partner a stock of goods, entered into a bond with surety, with covenants to the following effect: "Now there-

COVENANT—CONTINUED.

fore, be it known, that we, James Gillan, Neil Blue, Richard A. Colclough, W. A. Armstrong, John Martin, and Thornton Taliaferro, do hereby, for and in consideration of the sum of one dollar, to us in hand paid, by the said Shepherd Brown, the receipt of which is hereby acknowledged, as well as for the consideration aforesaid, covenant and agree to bind ourselves, our heirs, executors, &c. jointly and severally, unto the said Shepherd Brown, his heirs, &c., to save him harmless from the payment of all debts, or liabilities due from said concern, as well as all loss, liability or damage, that he has, or may incur, as a partner of the said Gillan. We jointly and severally guaranty, that the said James Gillan, shall fully satisfy and discharge all debts, dues, or demands, arising from said establishment." Held, that this was a bond of indemnity against loss, or damage, and was not a covenant to B. against liability to suit. *Taliaferro, Adm'r, v. Brown,* 702

2. A covenant by H. and two others, his sureties, to convey to F. "a half section of land, situate in Macon county, worth \$500, on a patent issued to William Walker, or to Edward Hanrick, as executor of Wm. Walker's estate, to the N. $\frac{1}{2}$, 31, 15, 23, situate in Macon county, Alabama," is an undertaking to convey the particular tract, or a half section of land in Macon county, worth \$500, as soon as a patent issued for the particular tract mentioned in the covenant. *Fitzpatrick v. Hanrick, et als.* 783
3. As the time when the patent would issue was uncertain, and more within the knowledge of the obligors than the obligee, an action would lie for a breach of the covenant, without a demand, as it was their duty to notify him that the event had happened, and what land they would convey.—*Ib.* 783
4. The rights of the obligee cannot be defeated, by a contrivance by the obligors, by which the patent for the land mentioned in the covenant is caused to be issued to another. *Ib.* 783

CRIMINAL CASES, PROCEEDINGS IN.

1. To constitute the crime of an "attempt to poison" a white person, by a slave, there must be an actual attempt to poison, by the administration of some poisonous drug, or substance, calculated to destroy human life.—*State v. Clarissa,* 57
2. The grand jury cannot be called, and required to expurgate themselves of any supposed interest, or bias, at the instance of one in jail, and expecting an indictment to be preferred against him. Objections to the grand jury must be taken by plea in abatement, at the term at which the indictment is found. *Ib.* 58
3. Where a slave after a whipping had confessed her guilt, and subsequently when the overseer inquired why she had committed the act, confessed the crime: held, that the answer to this question was not admissible evidence,

CRIMINAL CASES, PROCEEDINGS IN—CONTINUED..

as the question assumed the fact of her guilt as previously admitted by her. *Quere*—Would the subsequent confession of a slave, after a confession had been extorted, be evidence in any case? *Ib.* 58

DAMAGES.

1. Where an overseer employed by the year, is discharged before the termination of that period, without a sufficient excuse therefor, he may immediately institute his action for a breach of the contract, and recover not only the damages which then shall have accrued, but such as shall have developed themselves up to the time of the trial. *Martin v. Everett*, 375
2. If an attachment is wrongfully sued out, the plaintiff is responsible to the extent of the actual injury, but if vexatiously sued out, the case is one for vindictive damages, only in the event that the plaintiff has wantonly or maliciously resorted to the process. *McCullough, et al. v. Walton*, 492
See Warranty, 2.

DEBTOR AND CREDITOR.

1. Where the husband furnishes lumber, which the wife voluntarily allows to be used in erecting buildings on her separate estate, if the husband is in embarrassed circumstances at the time, this will be considered a gift to the wife in fraud of his creditors, and the latter may thus far make the wife's estate liable to pay their demands. *Hoot, et al. v. Sorrell, et al.* 386
2. If the husband merely expends his personal labor in the improvement of his wife's estate, the estate is not thereby made a debtor to the husband, nor can the creditors of the latter charge it with the value of the labor.—*Ib.* 386
3. Upon a bill by the creditors of the husband to charge the wife's estate, (among other things,) with the value of lumber furnished by the husband towards its improvement, the lumber must be estimated according to its value when the bill was filed; and to collect the amount with which the wife's estate is charged, the decree should not direct a sale, but the estate should be leased for term a sufficiently long to extinguish the charge.—*Ib.* 386
4. When stockholders in a corporation, after calls regularly made, are in default, a judgment creditor has a complete remedy at law against them, and therefore will not, for this cause only, be allowed to proceed in equity.—*Allen et al. v. Montgomery R. R. Co.* 437
5. A creditor cannot insist that a mortgage is void for the omission to register it, unless this ground is alledged in the bill—if alledged, the defendant has the right to reply notice to the creditor. *Ib.* 438
6. *Quere*—whether a sale will be set aside at the instance of a creditor interested in the sale, on the ground that the sale was at an under price, unless the creditor will offer to bid a larger sum: *Quere*, also, if a similar

DEBTOR AND CREDITOR—CONTINUED.

rule does not apply when the sale is in gross, and the assertion is, that a larger sum would be produced by a separate sale of each article. *Ib.* 438

See Assignments, 1, 2, 5.

See Chancery, 8, 25.

See Corporation, 2, 3, 4.

See Frauds, 5.

See Judgment and Decree, 5.

See Trust, and Cestui Que Trust, 3.

DEDICATION OF PROPERTY TO THE PUBLIC USE, &c.

1. The dedication of a street in a town or city, may be inferred from public documents of an ancient date, which refer to it as then existing, or from the deeds, or other papers of those who deny its existence. *Doe ex dem. Kennedy's Ex'rs v. Jones*, 63
2. Upon proof that a street was used as such, at a definite period, many years previous to the institution of the suit in which the question is involved, it may be inferred, in the absence of opposing proof, that it was dedicated to the use of the town, even before the time proved. *Ib.* 63
3. Where the streets of a town bordering on navigable water are dedicated to the use of the town and the public, if there is no limitation, the dedication will extend across the shore to low water mark, as the shore may be reclaimed, or fill up by accretion, and become part of the town. *Ib.* 63
4. To perpetuate the dedication of streets, it is not necessary that there should have been a continuous corporate existence of the town. *Ib.* 63
5. The general rule, that the fee cannot remain in abeyance, does not apply, where property is dedicated to the public use, and where the object and purpose of the appropriation looks to a future grantee, in whom, or in which the fee is to vest. The dedication will preclude the party making the appropriation from re-asserting any right over the land, at least so long as it remains in public use, although there may never arise any grantee capable of taking the fee. *Ib.* 63
6. If land dedicated to the public has been used by a corporation for a purpose not contemplated in the dedication, will such an abuse of the right of use, invest the original proprietor of the fee with the right to the possession, so as to entitle him to maintain ejectment? Should not a court of equity be resorted to in such a case, to compel the execution of the trust. *Ib.* 64

DEEDS AND BONDS.

1. The assent of a grantor to the provisions of a deed conveying property in trust for his benefit, is to be inferred from his acceptance of the deed at the time of its execution. *Pinkard v. Ingersol, et al.* 9

DEEDS AND BONDS—CONTINUED.

2. The assent of one *cestui que trust* will not validate a deed which expressly or by implication, requires the assent of others. *Ib.* 9
3. When the clerk, pursuant to an order of the court, that a bond to be approved by him should be filed within ninety days, receives a bond within the time, and endorses it, *filed in office*, he cannot afterwards be permitted to testify, that he did not approve or disapprove it. *Pearson, et al. v. Gayle,* 278
4. A constable's bond may be delivered as an escrow, to become the bond of the parties on the performance of a certain condition. *Robertson v. Cooper, et al.* 467
5. Where a bond is executed under an order in chancery, conditioned that certain slaves that had been seized to satisfy such decree as might be "rendered in the suit," should be returned, if the decree contemplated their return, the bond is not annulled, or the liability of the obligors restricted or impaired, by an amendment of the bill which merely associates other parties with the complainant, (the obligee,) without varying the frame of the bill, or extending or limiting the liability of the obligors.—*Falls v. Weissinger,* 802
6. There is no statute which requires the sheriff to return "forfeited," a bond taken in a suit in chancery, conditioned for the forthcoming of property if the decree requires it; consequently the obligee may maintain an action thereon, without showing such a return. *Ib.* 802
7. Where a bill is filed to subject a slave to the payment of the complainant's demand, and the defendant executes a bond with surety, conditioned for his delivery if the complainant is successful, the death of the slave previous to the rendition of the decree, or an order requiring his delivery, will absolve the obligors from a compliance with the condition. *Ib.* 802
 See Covenant, 1.
 See Error, Writ of, 5.
 See Evidence, 57.
 See Vendor and Vendee, 4.

DEEDS AND REGISTRY OF.

1. A deputy clerk is authorised to take and certify the acknowledgement of a deed, so as to warrant its registration. *Pinkard v. Ingersol, et al.* 9
2. Where the record recites a deed as proved, the court will presume it was by the subscribing witnesses, and the exclusion of the mortgagor, will not be sustained on the presumption that he was rejected because the subscribing witnesses were not first called. *Dearing v. Windham,* 204
3. Under our registry acts, the copy of a deed recorded pursuant to their directions, is not admissible evidence, without first satisfactorily accounting for the absence of the original. *Thompson v. Ives,* 239

DEEDS AND REGISTRY OF—CONTINUED.

4. When one professing to act as an attorney in making a deed, acknowledges that he signed it, &c. for the purpose of registration, his acknowledgement will be referred to the character in which he is acting. *Robinson & Caldwell v. Mauldin, &c.* 978
5. An authority to execute a deed of trust, gives the power by implication to acknowledge it for registration. *Ib.* 978
6. The omission to state in the probate of a deed, made by an attorney in fact, that it was *delivered*, is not essential, it having been in fact delivered by him and registered. *Ib.* 978
 See Assignment, 5.
 See Conflict of Laws, 4.
 See Evidence, 52.

DEEDS OF TRUST AND TRUSTS.

1. Where parties having actual or colorable claims to property conveyed by two different deeds of trust meet, and enter into a special agreement with reference to the trust property, this agreement is to be considered as ascertaining their respective rights, and will, in equity, as between the parties, furnish the basis for settling their rights, independent of the trust deeds. *Pinkard v. Ingersol,* 9
2. A growing crop of cotton may be conveyed by deed of trust. *Robinson & Caldwell v. Mauldin, &c.* 977
 See Assignments, 3.

DEMURRER.

1. If the defendant interposes a demurrer to an entire declaration containing several counts, if either count is good, the demurrer should be overruled. *Williams v. Spears,* 138
2. *Semble:* A plea in abatement is bad on demurrer for duplicity. *Caldwell v. Branch Bank at Mobile,* 549
3. The objection that there was no consideration for the covenant, cannot be taken on demurrer to the declaration. *Fitzpatrick v. Hanrick, et als.* 783
 See Notice, 1.

DEPOSITION.

1. An affidavit to suppress a deposition, because the party attended within the time, but after the deposition was taken, is sufficient, if it does not also state, that he has been injured by his inability to cross-examine the witness. *Cameron, Ex'r, v. Clarke, Smith & Co.* 259
2. A deposition may be taken at any time, within the time designated in the notice. *Ib.* 259

DEPOSITION—CONTINUED.

3. A deposition taken at the *office* of G. R. & Co. when directed to be taken at their *storehouse*, will be allowed, it being shown that they had an office under the same roof as their storehouse, and connected with it by doors and windows, and had no other office in the place. *De Witt v. Bigelow & Co.* 480
4. *Quere*—Whether the propounding of a question (improper in part) to a witness to be examined on interrogatories, is a sufficient reason to exclude the answer disclosing proper evidence, unless it appear the objection to the question was taken and notified to the opposite party before the commission issued. *Bradford v. Haggerty,* 698
5. Where a deposition is supposed to be irregularly taken, the party may re-take under an order of court, and that even when the cause is called for trial, and the other party has announced himself ready for trial, but is unwilling to waive exceptions to the deposition. *Milton v. Rowland,* 732
6. Although the omission to notify the opposite party in writing of the time and place of taking the deposition, may be good cause to suppress it, if the fact of notice is denied, yet a verbal notice is sufficient, if the fact of notice is not denied. *Ib.* 732
7. When the answer of a witness in a deposition asserts that her experience in the particular avocation of a midwife enables her to judge of particular diseases in females, and the opposite party omits to test her knowledge or experience by a cross-examination—*Quere*, if the objection will lie to answers stating her opinions and belief. *Ib.* 732
8. An exception to a deposition, to each answer, and to each sentence of each answer, amounts to nothing more than a general exception to the deposition. *Ib.* 732
9. Where a deposition contains a question and answer which discloses illegal testimony, it may be objected to on the trial; but where the objection is to the entire deposition, on a ground that it does not question the competency of the witness, the admissibility of the facts disclosed, or show that it had not been taken in conformity to the statutes, it seems that a motion should be made to suppress it before the cause is put to the jury. *Wall v. Williams,* 826

DETINUE.

1. Detinue will lie by the trustees and deacons of a religious society, to recover a deed which they had deposited with the defendant, and which he refused to re-deliver. *Stoker, et al. v. Yerby,* 322
2. Although an administrator cannot sell the estate of his intestate at private sale, and without an order of the orphans' court, yet if one thus sells without authority, and the property is delivered to the purchaser, and afterwards taken from his possession tortiously, he may maintain an action of detinue against the wrong doer. *Traylor v. Marshall,* 458

DETINUE—CONTINUED.

3. To maintain the action of detinue, the plaintiff must have the entire interest in the thing sued for; therefore three brothers and sisters cannot maintain detinue for slaves, given by the will of their grandfather to them and another, who is dead, and no administration granted on his estate. *Miller v. Eatman, et al.* 609

See Executors and Administrators, 19.

DIVORCE AND ALIMONY.

1. To constitute legal cruelty, to authorize a divorce, there must be actual violence committed, attended with danger to life, limb or health; or there must be a reasonable apprehension of such violence. *Moyler v. Moyler*, 620
2. The throwing a bucket of water on the wife in bed, with a threat of further violence if she did not leave the house, is legal cruelty. *Ib.* 620
3. Abusive language, and other unbecoming conduct, not amounting to legal cruelty, may be received in aggravation of an act of cruelty. *Ib.* 620
4. The answer of a defendant denying the allegations of the bill, does not make it necessary to prove them by two witnesses. Proof by one is sufficient. *Ib.* 621
5. Upon a divorce *a vinculo*, it is the duty of the chancellor to make a *division* of the estate of the parties. But the law does not require an equal division of the estate, but one graduated according to the nature of the case, considering the cause for which the divorce was granted, the party offending, the age of the parties, the estate to be divided, &c. &c.; but in all cases, if the estate of the husband is sufficient, the wife is entitled to a maintenance. *Lovett v. Lovett*, 763
6. Where the personal estate of the husband, consisting principally of slaves, was valued at \$13,685, and his real estate at \$1800, the cause of divorce being the abandonment of the husband by the wife, the parties having but two grown children provided for, the estate having been accumulated by the industry of both parties, and they being advanced in life—*Held*, that one-third part of the personal estate absolutely, and the use of one-third part of the land for life, appeared to be a just exercise of the legal discretion vested in the chancellor. *Ib.* 763
7. The proper course in such a case is, after the decree has been pronounced, for the divorced party to file an allegation of faculties, setting out the estate of the husband, which he is required to answer, after which, if necessary, proof may be adduced. But where the court, on motion and petition of the wife, referred the matter to the master to inquire and report the estate of the husband, before whom the husband appeared, held, that it was too late to raise the objection. *Ib.* 763

DOWER.

1. The widow is not dowable of a mill, which a purchaser from the husband

DOWER—CONTINUED.

- had erected, the one existing at the time of the sale having been dilapidated, and torn down by the purchaser. Such a case is a proper one for compensation, and a court of chancery can alone afford relief. *Beavers & Jemison v. Smith*, 20
2. Where an assignment cannot be made of a portion of the premises, the interest of one-third part of the value of the premises at the time of the alienation, is a just criterion. Where the principal value consists in buildings, requiring an annual outlay to keep them in repair—*Quere*—Is it not just the dowress should contribute her portion of the expense? *Ib.* 20
 3. At law, the widow cannot recover damages, as mesne profits, against a purchaser but from the institution of the suit, though the rule is otherwise as against the heir. But in equity, damages are allowed the widow upon the ground of title, and she is entitled to interest upon the arrears. *Ib.* 20
 4. Where a compensation is made in money, the decree should not be for a gross sum, by estimating the supposed present value of the widow's life estate, but for the payment annually of the sum ascertained to be the annual value of the dower interest during the life of the dowress, secured by a *lien* upon the estate, or in some other eligible mode. *Ib.* 21
 5. *Quere*—Where the widow receives a portion as one of the distributees of the estate, may not the court decree compensation, where she is proceeding against a purchaser from the husband with warranty? *Ib.* 21
 6. The right of dower depending upon the wife's surviving the husband, may be gratuitously renounced in favor of her husband, or she may require something to be paid for it, or property to be conveyed to her separate use, as an inducement to her relinquishment. *Hoot, et al. v. Sorrell, et al.* 386
 7. The orphans' court, under the act of 1835, has no jurisdiction to assign dower unless of lands of which the husband died seized. *Nance v. Hooper*, 552
 8. A sale of the husband's interest in lands under a *fi. fa.* does not affect the widow's right to dower in the same lands. *Ib.* 552
 9. The duty of maintaining the wife devolves on her husband, though she have a *dower estate* in virtue of a previous marriage. During the *joint lives* of husband and wife, the husband has the sole control and management of such an estate; and consequently an interest for that period, which may be levied on and sold under a *feri facias* to satisfy a judgment against him. *Neil v. Johnson*, 615

EJECTMENT, AND TRESPASS TO TRY TITLE.

1. If land dedicated to the public has been used by a corporation for a purpose not contemplated in the dedication, will such an abuse of the right of use, invest the original proprietor of the fee with the right to the pos-

EJECTMENT, AND TRESPASS TO TRY TITLE—CONTINUED.

- session, so as to entitle him to maintain ejectment? Should not a court of equity be resorted to in such a case, to compel the execution of the trust. *Doe ex dem Kennedy's Ex'rs v. Jones*, 64
2. It is allowable for the court to permit the landlord to defend instead of his tenant where the premises have been sold as the property of the latter, and where an action for the recovery of the possession has been brought by the purchaser; but the landlord when let in, cannot set up a title consistent with the possession sought to be recovered—he may however show his present right to retain it, and the superiority of his title. *Thompson v. Ives*, 239
3. When the statute of limitations has completed a bar, it gives to the party in whose favor it has run, a right of entry upon which he may prosecute ejectment, or if sued, defend himself. *Doe ex dem. Farmer's Heirs v. Eslava*, 1030
- See Heirs, &c. 2.

ELECTION.

1. One who is administrator of two estates, may elect to which of the two certain property belongs. But the act manifesting such election, must be definite, clear, and certain, and not ambiguous or doubtful, to estop him from afterwards asserting title. *McLane v. Spence, adm'r*, 172
2. Where the name of the principal is not disclosed by the agent when the contract is made, it is said that the creditor may change either of them at his election; and although he may have debited the agent, supposing him to be the principal, he may recover the amount of the latter, if the account between the principal and agent is not altered to the prejudice of the former. But if the vendor, with a knowledge of who the principal is, makes the agent his debtor, he is bound by the election, and can't look to the principal for payment. *Clealand v. Walker*, 1058

ERROR, WRIT OF.

1. When a single person appears and contests a settlement in the orphans' court, the contesting party is the one in whose name the writ of error should be sued out, there being no final judgment in favor of any others interested in the settlement. *Savage v. Benham, adm'r*, 49
2. When a settlement is made, and the administrator fails to require those claiming distribution to propound their interest, he will not be heard on error, to complain that their interest is not shown by the record. *Petty v. Wafford*, 143
3. Where a judgment effects the proper result, no matter by what erroneous reasoning it may have been induced, it will not be reversed. *Ledbetter v. Castles, et al.* 149

ERROR, WRIT OF—CONTINUED.

4. The statute having prescribed the term to which a writ of error shall be returned, the writ will not be dismissed, or an affirmance of judgment denied, because it is, upon its face, made returnable to a day after the court commences its session. *Riggs, et al. v. The Bank of the State*, 160
5. The time when a writ of error is returnable need not be recited in a bond conditioned for its successful prosecution, and if recited, is not an essential part of the obligor's contract; so, that if the writ be such as to authorise a judgment of affirmance against the plaintiff in error, it may be rendered against his sureties also. *Ib.* 160
6. The refusal of the primary court, to permit a party to prove the contents of certain advertisements and hand-bills, presents no question, unless it is shown what their contents were. *Pearson v. Howe*, 370
7. A writ of error will lie against the State on the refusal of the court to strike out improper items in the bill of costs in a State case, and the State is a proper party. *Weissinger v. The State*, 540
8. But where no judgment is entered on the motion, there is nothing to sustain a writ of error, and if one is sued out it will be dismissed. *Ib.* 540
9. Upon an order in chancery overruling a demurrer to a bill, leaving the cause to be proceeded in to a hearing, according to the practice, a writ of error will not lie under the third section of the act of 1846, "relating to judicial proceedings," or any other enactment; but the defendant must await the rendition of the final decree before he can thus bring up for revision the decision of the demurrer. *Hightower, et al. v. Kennedy, et al.* 562
10. In a proceeding under the act of 1843, "to establish lost records in Henry county," there appeared on the notice to the defendants, an acknowledgment of its service on one of them, with the words "and proved" written in the same sentence and immediately following; but this indorsement was dated previous to the notice being placed in the sheriff's hands, and the sheriff did not affirm by his return its execution on this defendant. The judgment entry however recited *that the parties in interest had notice of the proceeding*: *Held*, that in this condition of the record, it must be intended on error, that the parties to the judgment were before the primary court for its action. *Doswell, et al. v. Stewart, et al.* 629
11. Where the judgment and papers of the cause which were lost, are supplied by others, the order permitting it will not be reversed on error at the defendant's instance, though the substituted judgment is for less than the cause of action indicated by the declaration, and the primary court having ascertained that payments had been made on the original judgment, directed an execution to issue for only so much as was unpaid, it cannot be affirmed that there is an error; or if there is, it is beneficial to the party complaining. *Ib.* 629
12. Where the record does not state at whose instance an appeal was quash-

ERROR, WRIT OF—CONTINUED.

- ed, it must be intended that the motion for that purpose was made at the instance of the appellee, who was involuntarily brought before the court. *Carter v. Pickard*, 673
13. Wherever the court acts against a party without his consent given, or to be implied, the legal inference is, that the act was *in invitum*, and no bill of exceptions is necessary in such case, where the judgment shows the error. *Ib.* 673
14. Under our statute the deputy sheriff, when he arrests a party on a *capias*, for a misdemeanor, is authorized to take his recognizance, and such recognizance need not be certified by the officer. *Shreeve & Knapp v. The State*, 676
15. It is no error affecting the judgment of a cause, that the court for its own information, makes inquiries of a physician as to the extent of knowledge usually possessed by midwives. *Milton v. Rowland*, 732
16. Error assigned on charges which were not excepted to at the trial, cannot be examined in this court. *Ib.* 733
17. A judgment in favor of the "officers of the circuit court of Mobile," is a nullity, and no writ of error can be sued upon it. *Patterson, et als. v. Officers Cir. Ct. Mobile*, 740
18. Where in an action of debt, the verdict is in damages, for which judgment is given, this irregularity is not available on error. *Spence v. Thompson*, 746
19. Where the defendant pleads the performance of the condition of his bond generally, and another affirmative and more special plea which was good in itself, but the matter of which is admissible under the plea of performance, if a demurrer is sustained to the second plea, an appellate court will not refuse to reverse the judgment, because the defendant could have had the benefit of it under the pleadings on which the cause was tried; unless it appears that he in fact availed himself of such special defence. *Falls v. Weissinger*, 802
20. Although an issue has been directed to ascertain the sanity or insanity of an individual at the time of making a contract, and the verdict of insanity is returned by the jury, and the judge trying the cause certifies that he cannot say it was improper, yet an appellate court must disregard these proceedings, if the evidence at the hearing of the bill was such that the chancellor should have decreed on it in the first instance. *Atwood v. Smith*, 894
21. When a jury has been irregularly impaneled by the orphans' court, to try whether a slave was the property of an administrator in his own right, or assets of the estate, and a verdict returned against the administrator, ascertaining the value of the slave, his consent that a judgment should be entered in the form in which the finding of the jury was expressed, is not

ERROR, WRIT OF—CONTINUED.

- a waiver of the irregularity, but a mere agreement that the court may, in conformity to the verdict, declare that the slave was assets of the estate, and the value such as the jury had assessed. *Reynolds' adm'rs v. Reynolds' dist.* 1024
22. If an objection that the deposition of one of the defendants who was examined at the complainant's instance, was not taken under an order for that purpose, is not made in the primary court, it will not be entertained on error. *Eldridge, et al. v. Turner, &c.* 1050
- See Amendment, 1.
- See Estates of Deceased Persons, 1.
- See Evidence, 14.
- See Executors and Administrators, 3.
- See Garnishment and Garnishee, 13.
- See Guardian and Ward, 3, 7.
- See Husband and Wife, 1.
- See Intendment, and Legal Presumption, 4.
- See Practice at Law, 4, 12, 13, 16.

ESTATES OF DECEASED PERSONS.

1. Where the testator in his will directs his executors to carry on his plantation, in the same manner as he himself had carried it on, until the death of his wife, and after a partial administration of the estate by one of the executors named by the will, the administration is committed with the will annexed, to another person, who enters on the performance of this trust of the will, the orphans' court has jurisdiction to require him to make annual settlements; and when he makes an annual settlement, pursuant to the act of 1843, that may be reviewed in this court by writ of error. *Quere*, however, whether those interested in the final settlement afterwards to be made will be precluded from *surcharging* the annual settlements. *Savage v. Benham, Adm'r,* 49
2. A constable's receipt, purporting to be for the payment of a judgment against the estate, is not of itself a sufficient voucher to prove the debt, or its payment. *Ib.* 50
3. When an administrator is cited by a husband in right of his wife, omitting her name, and a settlement is submitted to, it is a waiver of all irregularities in the mode of citation. *Petty v. Wafford,* 143
4. When a settlement is made, and the administrator fails to require those claiming distribution to propound their interest, he will not be heard on error, to complain that their interest is not shown by the record. *Ib.* 143
5. It is no defence at law, either partial or total, that the creditor at the instance of the surety, agreed to file the note in the clerk's office for a divi-

ESTATES OF DECEASED PERSONS—CONTINUED.

- dend, the principal being dead and insolvent, and that for want of the necessary affidavit it was rejected by the orphans' court. If the party has any redress, it must be by action to recover damages for the misfeasance. Whether a court of equity would afford redress—*quere?* *Pearson, et al. v. Gayle*, 278
6. The act of 1843, "to amend the laws now (then) in force in relation to insolvent estates," applies to all claims which are filed against the decedent's estate, where an exception is taken in the manner pointed out by the act, for the want of an affidavit; and although the claim be evidenced by a judgment, an exception to it will be allowed, if it is not duly verified.—*Campbell's Adm'r v. Campbell's creditors*, 730
7. The statute which directs that commissioners shall be appointed within three months after the estate of an intestate has been reported solvent, to make distribution of the same, is not imperative on the orphans court.—*Reynolds' Adm'r v. Reynolds' Distributees*, 1023
8. Where a person entitled to the distributive share of an estate dies previous to distribution, his personal representative must be brought before the orphans' court, on the final settlement with the administrator, although the distributee was an infant at the time of his decease. *Ib.* 1023
- See Action, 1.
 See Court, Orphans, 1.
 See Executors and Administrators, 2, 5, 11.

ESTOPPEL.

1. Where a party purchased land for which he executed his several notes, promising to pay the purchase money at different periods, and died; his administrators paid one of the notes, and then by agreement with the vendor rescinded the contract, stipulating to renounce the benefit of it, if the vendor would deliver up the unpaid notes, which was done; afterwards at the request of one of the administrators (representing that the judge of the orphans' court desired it) the vendor wrote a receipt on these notes, acknowledging that they had been paid to him; but it did not appear that either the vendor or administrator intended to practice a fraud, or that the receipt had been used for an improper purpose: Held, that the receipts did not conclude the vendor from showing the circumstances under which they were given, and that no money was paid to him by the administrators. *Strange, et al v. Watson*, 324
2. The sureties of a constable, who knowingly permit him to act under an insufficient bond, will be held responsible upon it. *Robertson v. Coker, et al.* 467
3. A verbal admission by a party that personal property in his possession belonged to the plaintiff, does not estop the defendant from showing that the

ESTOPPEL—CONTINUED.

- admission was made by mistake, or that it is untrue; especially, where the plaintiff was not misled by it, or it did not induce him to institute his action. *Gamble v. Gamble's Adm'r*, 966
4. A party cannot defeat a recovery against himself by alledging that a judicial proceeding in which he was the actor was irregular, where the action against him is founded on a contract by which he stipulated to prosecute it to a close, and a decree was rendered and executed previous to the institution of the action. *Brown v. Isbell*, 1010

ESTRAYS.

1. Although the taker up of an estray, is required by law to give the clerk of the court notice of such estray, if it has been delivered to the owner, died, or escaped without his fault, within twelve months, and to account with him, for such as he still holds, yet if he fails to do so, he is not liable beyond the condition of his bond, that is, one half the appraised value of such as are not reclaimed by the owner, die, or escape. *Quere?* is not the taker up, guilty of such negligence, liable in any event for costs. *Clerk Co. Court of Lowndes v. Anderson*, 410

EVIDENCE.

1. When the question of sanity or insanity, is in issue, a witness may be asked whether there was a difference in the conduct of the deceased during the last five years of his life, and his conduct twenty years previously, and it is error to refuse the question to be put, unless the record shows, that the question was put to the witness in another form, and an opportunity afforded him to tell what he knew. *Watson and Watson v. Anderson*, 43
2. It is not error in the court to refuse to permit the following questions to be put: Have you heard the deceased say any thing about his dogs, and chickens, and cry; if so, what did the deceased say. *Ib.* 43
3. A witness may be asked, "If the deceased said, or did any thing showing a want of soundness of mind, state what it was." *Ib.* 43
4. A constable's receipt, purporting to be for the payment of a judgment against the estate, is not of itself a sufficient voucher to prove the debt, or its payment. *Savage v. Benham, Adm'r*, 50
5. Where a slave after a whipping had confessed her guilt, and subsequently when the overseer inquired why she had committed the act, confessed the crime: held, that the answer to this question was not admissible evidence, as the question assumed the fact of her guilt as previously admitted by her. *Quere*—Would the subsequent confession of a slave, after a confession had been extorted, be evidence in any case? *The State v. Clarissa*, 58
6. When an overseer is charged with the collection of accounts contracted with his employer's smith shop, the opinion of witnesses of the annual va-

EVIDENCE—CONTINUED.

- lue of the work done is not evidence to show a set off to a suit by the overseer, as he is chargeable only for the monies actually collected. *Hale, et al. v. Brown*, 87
7. Under an issue formed on the plea of the heir, &c. that no lands descended, &c. the *onus* rests with the plaintiff to show the particular lands sought to be charged; and a devise of all lands in a will is no proof that any descended or were devised. *Wilkinson v. Allen, et al.* 128
8. When there is an unsettled account between two persons, and one receives from the other a sum of money, which he agrees to secure by a deed of trust; he may, when sued for this money, reduce the amount, or defeat the action, by showing that the other party was indebted to him at the time upon the unsettled account; but he cannot cast upon the other party the burthen of unravelling the account. *Drinkwater v. Holliday*, 134
9. A written instrument may be contradicted by the party making it, when offered in evidence in a suit, to which a stranger to the instrument is a party. *Venable v. Thompson*, 147
10. Signs or badges of fraud are repelled, by showing that a full consideration was paid for the property, but the proof of fairness would be more stringent, than if such badges of fraud did not exist. *Terrel et als. v. Green et als.* 207
11. An indorsement on the note, of the sum for which it was discounted, and the date of the discount, is an admission on the part of the bank, of the sum lent upon the note, of which the defendant may avail himself, as otherwise the inference would be, that the bank was entitled to recover the entire amount. *Colgin v. The State Bank*, 222
12. The defendant made a writing of the following tenor, viz: "Good for three hundred dollars. Jan'y 15th, 1829." *Held*, that it was competent for the plaintiff to show, by parol evidence, that it was delivered to, and intended to acknowledge a liability to him; but such evidence of an agreement made simultaneously with the writing, is not admissible, to show it was understood between the parties, that there was no present indebtedness, or that it should be payable at a future day, so as to postpone the time when the statute of limitations began to operate. *Nicholas v. Krebs, ex'r*, 230
13. Under our registry acts, the copy of a deed recorded pursuant to their directions, is not admissible evidence, without first satisfactorily accounting for the absence of the original. *Thompson v. Ives*, 239
14. *Semble*: Where both parties claim under distinct purchases made at sales under several executions against the same defendant, it cannot be presumed that either party is in possession of the title papers of the defendant in these executions, so as to make the mere failure of either to produce them on a notice by the other, sufficient to let in secondary evi-

EVIDENCE—CONTINUED.

- dence of their contents. But whether the notice was sufficient or not, no injury could result from the admission of such evidence, as the title of the defendant in the executions was conceded by both parties. *Ib.* 239
15. Where an attorney stated a letter was written by him by the plaintiff which was lost, and the contents not remembered by him, another person, to whom the attorney showed the letter, is competent to prove its contents, although he has no knowledge of the hand-writing. The identity of the letter, and the proof of its contents, are questions for the jury. *Curry & Haynee v. Robinson, use, &c.* 266
16. In an indictment charging a father with living in adultery with his daughter, his confessions that she is so, are admissible in evidence. *Morgan v. The State,* 289
17. Where a party purchased land for which he executed his several notes, promising to pay the purchase money at different periods, and died; his administrators paid one of the notes, and then by agreement with the vendor rescinded the contract, stipulating to renounce the benefit of it, if the vendor would deliver up the unpaid notes, which was done; afterwards at the request of one of the administrators (representing that the judge of the orphans' court desired it) the vendor wrote a receipt on these notes, acknowledging that they had been paid to him; but it did not appear that either the vendor or administrator intended to practice a fraud, or that the receipt had been used for an improper purpose: *Held*, that the receipts did not conclude the vendor from showing the circumstances under which they were given, and that no money was paid to him by the administrators. *Strange, et al. v. Watson,* 324
18. When proof is made of the refusal of a tender, the defendant is not entitled to have his declarations made at the refusal put before the jury as a part of the transaction. *Mahone v. Reeves,* 345
19. Declarations of a plaintiff in trespass, made in relation to his title after the trespass complained of, are not competent evidence in his own favor. *Cox v. Easley, et al.* 362
20. Neither is the act of the sheriff, in omitting to make sale of the property as that of a third person, evidence, when induced by such declarations of the plaintiff after the trespass. *Ib.* 362
21. Where the plea asserts the interest in a suit is in a stranger to the record and sets up a set off against him, his declarations that the interest still continues, and that the debt was put in the hands of the plaintiff of record, to get it beyond the reach of creditors, are admissible, though made during the pendency of the suit, it being shown by other evidence, that he is the party in interest. *Bowen v. Snell, use, &c.* 379
22. The possession of a deed by the vendee is *prima facie* evidence that it was delivered to him by his vendor, and the *onus* lies upon those interest-

EVIDENCE—CONTINUED.

- ed to prove the reverse to repel the presumption by proof. *Houston v Stanton and Stanton*, 413
23. A constable is not a competent witness for his sureties, though released by them. *Robertson v. Coker*, 467
24. When a title is acquired *bona fide* to a slave, it is not a badge of fraud, that the purchaser suffers him to go into the possession of a former owner of the slave, for a short time, although he is insolvent; he having parted with the title, and the slave having been out of his possession for two years previous. *Prosser v. Henderson*, 484
25. S. made his promissory note to H. for the payment of \$231 57, "for work done on a saw and grist mill, and waste way:" *Held*, that the statement of the consideration did not conclusively indicate that the note was a complete expression of the contract; and that it was competent for S. when sued on the note, to show what was the contract between the parties, that H. stipulated the work should be well done, should answer the purpose for which it was intended, &c. *Self v. Harrington*, 489
26. Where the father, a man of wealth, six or seven months after the marriage of his daughter, and when she and her husband were leaving the father's house to settle themselves in a distant State, delivered to the son-in-law sundry slaves, but fewer in number than his estate authorized to advance as a patrimony, it will be presumed that the delivery was intended as a gift to the son-in-law, and it devolves upon the father to show that they were intended as a loan or otherwise. *Hooe v. Harrison*, 499
27. In a suit between K. and J. the record of a recovery against J. in a suit in which he was summoned by a stranger as the debtor of K. but denied his indebtedness, is no evidence of the amount then due to K. although in a contest between the creditor and J. the latter was found to be indebted to K. in a sum greatly less than claimed in the suit by K. The whole proceedings in the other suit are *res inter alias acta*. *Jones v. Kolisenski*, 607
28. When money is received by one from a sheriff to which another is entitled, but the person receiving it gives a bond of indemnity to the sheriff reciting the attachment of the money at the suit of a stranger, against the person entitled, and providing for the repayment unless the money is determined to belong to the person receiving it, these recitals are not evidence of the existence of the attachment in a suit by the person entitled against the one receiving it. If however, the existence of the attachment in 1840, was shown, the presumption from the lapse of time, is, that it was discharged so as to determine the lien. *Oliver v. Ellzy*, 632
29. When the witness will be responsible to one of two persons, no matter which way, the verdict is a case of balanced interest as presented, and the witness competent. *Locket v. Child*, 640
30. Parol evidence is admissible to show that the assignment of a mortgage to

EVIDENCE—CONTINUED.

- one by name was intended for the benefit of another as well as himself.—
Ib. 640
31. Where a precedent liability has been suspended or released by the acceptance of a note indorsed by one, liable on the former demand, the plaintiff cannot recover on the primary liability without showing the same proof as would enable him to recover on the indorsement; and therefore in the absence of such proof, there is no material error in excluding proof of the primary liability. *Bradford v. Haggerthy*, 698
32. The declaration or claim made by a person as to his place of residence, is not proper evidence to prove his residence. Such a declaration is merely hearsay, unless connected with some act concurrent with it, and which the declaration has the tendency to explain. *Ib.* 698
33. When the point to be ascertained was the residence of an individual previous to the 9th of July, his act in giving a vote and claiming his residence in a particular place on the first Monday of August afterwards, is not admissible evidence. *Ib.* 698
34. To let in the exemplification of the probate of a will in the courts of this State, under the act of Congress, no particular form of certificate by the clerk is necessary. If the record is attested by the clerk, and his attestation is certified by the presiding judge to be in due form, it is immaterial how the attestation is made. *White v. Strother, et al.* 720
35. In an action of trover to recover slaves, it is irregular to ask a witness whether some of the slaves were reputed by the family of the defendant as the children of another of them. To let in the declarations of third persons, in cases of pedigree, it must be shown they are dead. *Ib.* 720
36. The acts and conduct of slaves towards each other, as family conduct, may be shown in evidence, and the conduct of a slave child in calling another slave mother, is a circumstance which may be proved to a jury, to identify the relation of mother and child. *Ib.* 720
37. Any person may speak of the existence of disease in another, when the disease is perceptible by the senses. *Milton v. Rowland*, 732
38. When a record is stated as an exhibit to an answer to a bill in chancery and the exemplification of the suit is given in evidence by the party making the answer, although offered only to show the fact of the suit, and an eviction by means of an injunction allowed in it, the opposite party may read the answer, to prove the existence of the record. *Ricketts, et al. v. Garrett*, 807
39. Where the defendant, the maker of a promissory note, introduced a witness who stated that there was no consideration passing from the plaintiff, the payee, and that the latter was unknown to the former, it is competent for the plaintiff to ask the witness, if the note was made at the instance of a third person, and whether there was any consideration passing from that person to the maker, on which the note was founded, and what it was.—
Moore v. Ponders, 815

EVIDENCE—CONTINUED.

40. In a suit by two as late partners, it is admissible for the defendant, on the general issue, to prove that no partnership existed at the time of the contract. The effect of the act of 1839 (Dig. 324, § 68,) is to revive the rule declared in *Davis v. Smith*, 2 Stewart, 222, and overruled in *Hunley v. Lang*, 5 Porter, 154. *Starke & Moore v. Kenan, Ex'x.* 818
41. Declarations by one of two joint partners, that the other was not his partner at the time of the alledged contract, is admissibl evidence. *Ib.* 818
42. It is not allowable to ask of a witness whether an Indian of the Choctaw tribe became a citizen of Alabama after the laws of the State were extended over the Choctaw territory. A direct answer to such a question is a conclusion of law, which the court should decide from the facts proved. *Wall v. Williams,* 826
43. A witness who swears that he knows the hand-writing of a person, is *prima facie* competent to testify in relation to it, without stating the source of his knowledge. *Henderson v. Bank at Montgomery,* 855
44. An agent of the bank being required to produce a sworn copy of his appointment, if of record on the books of the bank, does so by annexing what purports to be a copy from the books, and swearing to it, although he does not expressly state that he compared it with the original. *Ib.* 855
45. Where assignable or negotiable paper is transferred otherwise than by indorsement, that a debt due from the assignor to the assignee, might be extinguished by an application of the proceeds, the inference that if the notes were unproductive, the assignor would be chargeable upon the original consideration, may be repelled by countervailing proof, either oral or written. *Gookin v. Richardson,* 890
46. A party may prove that the note sued on, was given in consideration of the purchase of a brick-yard, and that the vendor agreed in consideration of the sale, not to make bricks in the town of Cahawba. *Comelander v. Bird,* 913
47. The promises being independent, the agreement not to make bricks in the town, could not be pleaded in bar of the action, but evidence of the fact would be admissible, to reduce the damages. *Ib.* 913
48. Testimony that the bricks made by the defendant were not marketable, would be admissible on the part of the plaintiff, to show that the defendant had sustained no injury by the plaintiff's breach of the contract; but he could not show merely, that his bricks were of better quality than those of the defendant. *Ib.* 913
49. Under the statute, when notice is given by the surety sued to another not sued, the judgment of the common creditor, in the absence of fraud and collusion, is conclusive of the liability of the surety, and ascertains the amount of contribution between the sureties. *Broughton v. Robinson,* 923
50. Although the judgment itself under such circumstances is conclusive, it is no error if the plaintiff introduces other regular evidence. *Record ev-*

EVIDENCE—CONTINUED.

idence of the liability of the principal debtor, by the production of the creditors' judgment fixing his liability, is admissible, though unnecessary.
—*Ib.* 923

51. As the statute makes the certificate of a notary in the protest of an inland bill, that he had mailed a notice of the dishonor, addressed to the drawer at a certain post office, evidence of the fact, if the protest and notice recited therein are regular, the holder may prove on the trial that the notice was addressed to the proper office. *Leigh & Co. v. Lightfoot*, 935
52. The indorsement on a deed of gift of personal property, that it was *acknowledged and recorded*, purporting to be made by the clerk of a court of another State, is not such evidence of the fact of registration, as the courts of this State will recognize. To authorize the admission of such evidence, the deed should be authenticated as the act of Congress requires; and it should also appear, that the law of the sister State required or authorized the registration of such a deed. *Gamble v. Gamble's adm'r*, 966
53. The original papers in a cause are not admissible evidence, if the final record has been made up as required by the statute. *Brown v. Isbell*, 1009
54. Parol evidence of contemporaneous stipulations is inadmissible to control or vary the legal effect of a written instrument; but where the writing is incomplete and does not profess to set out the entire contract, parol evidence has been received to prove the part omitted. So if the writing merely contains an acknowledgment of *value received*, without stating what it was, it is competent for the party sued on it, to show what the consideration was, and that it has failed, either in whole or in part. *Ib.* 1010
55. Evidence that an assignee holds a paper in trust for another, and not in his own right, does not contradict the assignment, and in a proper case is admissible. *Ib.* 1010
56. Where it is shown or can be intended that a paper is in the possession of a party and in court, so that it can be produced without delaying the trial, a notice at the trial will perhaps be sufficient to let in secondary evidence of its contents, if it is not produced. *Ib.* 1010
57. An ancient deed, that is, one *more than thirty years old*, having nothing suspicious about it, is presumed to be genuine, and if found in the proper custody is admissible evidence, when supported by proof of corresponding possession. *Doe ex dem. Farmer's Heirs v. Eslava*, 1028
58. Under the act of Congress of 1822, which contemplates that tracts of land not located or their limits defined, if claimed under incomplete grants shall be surveyed in order to obtain from the United States the usual evidences of title, a survey certified in the hand writing of a deputy surveyor and recognized in a patent certificate, is admissible evidence, although it is not shown that the survey was made under a previous order for that purpose. *Ib.* 1029

EVIDENCE—CONTINUED.

59. A certificate made by the register of a land office of the proper district, within the appropriate sphere of his duties, to enable the claimant of land to receive a patent, is admissible evidence upon proof of its genuineness. —*Id.* 1029
60. Where the complainant alledged, that a note payable *in totidem verbis* to C. for his use, made under a contract between C. and T., by which C. was to receive the money for the complainant's benefit, and C. denied the allegation, the denial will be overbalanced by the production of the note and the positive testimony of one witness supporting the bill. *Eldridge, et al. v. Turner, &c.* 1050
61. For the purpose of showing that a note was intended to bind the agent and not the principal, whose name is similar, it is allowable for the principal in an action against him, to prove that a suit had been brought and prosecuted to judgment against the agent; but the effect of this evidence may be impaired by proof, that, that suit was brought by mistake. *Clealand v. Walker,* 1058
- See Chancery, 23.
- See Estoppel, 3.
- See Executors and Administrators, 18.
- See Husband and Wife, 17.
- See Indian and Indian Tribes, 1.
- See Judgment and Decree, 7.
- See Land Titles South of Lat. 31, 6, 7.
- See Notary Public, Protest, &c.
- See Parent and Child, 3.
- See Pleading, 12, 13, 16.
- See Practice at Law, 2, 24.
- See Principal and Agent, 4.
- See Right of Property, Trial of, 2.

EXCEPTIONS, BILL OF.

- 1 No individual has the right to intervene in the court of commissioners of roads and revenue, and put questions on the record by bills of exception, in the matter of a public road. *Moore v. Hancock,* 245
- 2 The refusal of the primary court, to permit a party to prove the contents of certain advertisements and hand-bills, presents no question, unless it is shown what their contents were. *Pearson v. Howe,* 370
3. An objection to the admissibility of an entire record, will not authorize the objector to raise a question in this court, relating to costs alone. *Faulkner and Paulkner v. Chandler,* 725

EXCEPTIONS, BILL OF—CONTINUED.

4. An exception to a deposition, to each answer, and to each sentence of each answer, amounts to nothing more than a general exception to the deposition. *Milton v. Rowland*, 732
See Error, Writ of, 13.

EXECUTION, PROPERTY EXEMPT FROM.

1. The law exempting certain articles from levy and sale, for the use of families, applies whether the family is stationary or moving from place to place. Nor would an intention on the part of the head of the family, to abscond from one part of the State to another, deprive the family of this privilege. Whether an intention even to abscond beyond the limits of the State would make any difference—*quere?* *Davis v. Allen*, 164

EXECUTION, WRIT OF.

1. A stranger to the proceeding cannot move to amend the return made by the sheriff, by striking out a levy made on a slave, upon the ground that it did not belong to any of the defendants in the execution, but was the property of the applicant. *Cawthorne v. Knight*, 268
2. A memorandum indorsed by the sheriff on a *fi. fa.* in these words, *case arranged in bank as per instructions*, is not equivalent to a return of satisfied, nor sufficient ground to enter satisfaction of the judgment, or to quash a subsequent execution. *Gilchrist v. Branch Bank at Montgomery*, 408
3. An *alias* execution, issued by a justice of the peace, after the death of the defendant, is an absolute nullity, and no rights can be acquired under it. *Henderson & Hudson v. Gandy's Adm'r*, 431
4. It is a sufficient excuse for an officer in not returning an execution, that the plaintiff authorized him to hold it up. *Robertson v. Coker*, 466
5. The parties in whose favor executions are required to be issued by the act of 1830, on a decree of the orphans' court, for the final settlement of the accounts of executors, administrators and guardians, are upon the return of "no property found," entitled to executions *in their own names* against the sureties of the defendant in the decree. *Cawthorn v. Knight*, 579
6. The courts, in virtue of their power over process issued by them, or their officers, without the aid of legislation, may amend a execution by striking therefrom the name of a person who is improperly joined as a defendant with several others, without impairing its validity as to those against whom it should have issued. *Ib.*, 579
7. When the judgment is in the name of K. as guardian of C. and after a levy and forthcoming bond, on a *fi. fa.* pursuing the judgment another *fi. fa.* is issued on the bond, in the name of C. by his guardian K. the last execution is irregular, because of the change of plaintiffs, and should be quashed on motion. *Smith & Bowdon v. Knight*, 618
8. The return of a sheriff on a preceding execution that he had levied on

EXECUTION, WRIT OF—CONTINUED.

slaves, is not evidence that he kept them for any definite time, so as to warrant a charge for their keeping, the time of keeping not being stated in the return. *Spence v. Thompson*, 746

See Judgment and Decree, 5.

See Lien, 2, 3.

See Sheriff and his Sureties, 2.

See Summary, Proceedings, 1.

EXECUTORS AND ADMINISTRATORS AND THEIR SURETIES.

1. Where slaves are left by will to minor children, the executor is not discharged by delivering them to the children's father, but is accountable on their attaining majority, if the slaves are removed from the State and converted. *Lang, et al. v. Pettus*, 37
2. An administrator with the will annexed, carrying on a plantation under a power in the will, to do so in the same manner the testator had done, is required to show, when settling his accounts in the orphans' court, to sustain his charges for articles furnished for the estate, or the payment for services rendered, that the same came to the benefit of the estate, or were rendered to it. *Savage v. Benham, Adm'r*, 49
3. Beyond this, so far as his acts are consistent with good faith, it is not incumbent on him to show that the articles purchased were necessary, or the price paid was reasonable. Under such a will, his discretion will not be reviewed, unless exercised in so unreasonable a mode as to produce distrust of its *bona fides*. *Ib.*, 49
4. Such an administrator is not chargeable with, and therefore is unauthorized to pay the debts contracted by the executor on account of the estate except under such circumstances as would induce a court of equity to charge the estate. *Ib.*, 50
5. When the demand of a creditor of the deceased has been presented to the administrator within the proper period, it is the duty of the latter to pay it as soon as the assets are converted into money, and he cannot discharge himself from liability by a settlement with the distributees, or by a decree of the orphans' court directing distribution. Where a judgment was recovered against an administrator, and an action brought thereon against himself and sureties, suggesting a *devastavit*, the sureties cannot defeat a recovery by showing such settlement and distribution. *Dean, et al. v. Portis, &c.*, 104
6. An action may be brought against the sureties on an administration bond, alledging that the administrator had wasted the assets; and this although the *devastavit* of the administrator had not been fixed in a separate suit but there was only a judgment against him *de bonis intestatis*. *Ib.*, 104

EX'RS AND ADM'RS AND THEIR SURETIES—CONTINUED.

7. *Semble* : In an action on the administration bond suggesting a *devastavit*, the sureties can only be charged to the extent of the assets actually wasted; but the jury need not ascertain by their verdict, how much was wasted. *Ib.* 104
8. In a *sci. fa.* against an executrix and heir or devisee, the former cannot be made responsible to a judgment to be levied of the goods and chattels in her hands to be administered; and a replication by way of new assignment charging her in that character, is a departure from the *sci. fa.* and may properly be stricken out. *Wilkinson v. Allen, et al.* 128
9. A plea by an administrator that the estate has been declared insolvent, is bad, unless it discloses, that the report of insolvency was made by him, and that he still continues the representative of the estate. *Cameron, Ex'r, v. Clarke, Smith & Co.* 259
10. A suit cannot be maintained against an executor who has declared an estate insolvent, upon his official bond, assigning as a breach, that he had not made a full inventory of the assets. *Edwards v. Gibbs,* 292
11. The effect of the decree of insolvency, is to transfer to the orphans' court the exclusive jurisdiction of all claims against the estate, and in that court on the final settlement, it may be shown that the administrator has withheld or wasted the assets. Whether equity might not afford relief in certain cases—*Quere?* *Ib.* 292
12. Advances made to the widow and children by an administrator, cannot be admitted as a credit to him on the settlement of his administration account. *Parker and wife v. McGaha, Adm'r,* 521
13. An administrator is chargeable with interest, from the time money of the estate comes to his hands, unless he makes oath that he has not used the funds, and if he does, it may be controverted, and an issue made to try the fact. *Ib.* 521
14. A specialty was made payable to M. H. and S. M., executrix and executor of J. H. deceased, and in a declaration thereon, R. (the plaintiff,) described himself as administrator *de bonis non* with the will annexed, &c. of J. H. deceased, unadministered by M. H. and S. M.—alleging that after the making of the writing obligatory, the executrix and executor were removed from the administration, and R. appointed in their stead: *Further*, that the writing being unpaid, was given over by the executrix and executor, as part of the unadministered assets of J. H.'s estate—of all which the defendant had notice, &c. *Held*, that after a judgment by default, it would be intended the writing was assets of the testator's estate, that M. H. and S. M. had been removed, and had delivered the same to R. as their successor, and that consequently he could maintain an action thereon.—*Spence, et al. v. Rutledge, Adm'r,* 590
15. Where one of several brothers and sisters, having title to personal pro-

EX'RS AND ADM'RS AND THEIR SURETIES—CONTINUED.

- erty, dies in infancy, the remaining brothers cannot sue at law, to recover the property, until administration is taken out on the estate of the infant. *Miller v. Eatman, et al.* 609
16. To maintain the action of detinue, the plaintiff must have the entire interest in the thing sued for; therefore three brothers and sisters cannot maintain detinue for slaves, given by the will of their grandfather to them and another, who is dead, and no administration granted on his estate. *Ib.* 609
17. An administrator *de bonis non* of a solvent estate, can only recover from his predecessor, whether he has been removed, or has resigned, the assets which remain in his hands, in specie, unconverted. A settlement of his administration can only be made between him and the distributees, or legatees of the estate. *Nolly v. Wilkins,* 872
18. The possession of personal property which one acquires as an administrator, cannot be united to and perfect an equitable title which he claims in his individual capacity, so as to defeat an action by the party having the legal estate. *Gamble v. Gamble's Adm'r* 966
19. Where one acquires the possession of property as an administrator, and an action of detinue is brought against him for its recovery without noticing his representative character upon the record, it cannot be assumed that he is a wrong-doer, so to prevent him from defending upon the title of his intestate. *Ib.* 966
20. It is the duty of an administrator, to collect the debts due the estate he represents, and when the assets in his hands, above what is necessary to satisfy the demands of creditors, consist of notes, a decree should not be rendered by the orphans' court requiring their distribution, where some of the distributees are in their minority, although the latter are represented by guardians. *Reynolds' Adm'r v. Reynolds' Dist.* 1023
21. Where an administrator, under an honest claim of right, omits to return a slave in the inventory, as a part of the testator's estate, he should not be charged with her value; but if his claim is unfounded, she should be brought into the distribution, and if necessary a sale of her should be ordered. *Ib.* 1023
22. Where an administrator, in the performance of his duty causes advertisements to be printed in newspapers, he should be allowed on the settlement of his accounts the charges for printing. *Ib.* 1024
- See Action, 1.
- See Chancery, 22.
- See Court, Orphans', 4.
- See Detinue, 2.
- See Election, 1.
- See Estates of Deceased Persons, 1.

EXRS AND ADM'RS AND THEIR SURETIES—CONTINUED.

- See Execution, Writ of, 5.
 See Husband and Wife, 3, 16.
 See Trover and Conversion, 2.

FORCIBLE ENTRY AND DETAINER.

1. It is no objection to a complaint for a forcible entry and detainer, that it is unnecessarily prolix in describing the premises sought to be recovered; if it furnishes *data* from which a diagram of the *locus in quo* may be drawn, its locality and bounds ascertained, it is sufficient. *Bell v. Killcrease*, 685
2. Where the transcript of the proceedings before the justice in a case of forcible entry and detainer, shows that the defendant pleaded *not guilty*, that a jury was summoned and impaneled, who found a verdict against him on which judgment was rendered, the defendant cannot in an appellate court object to the want of, or to defects in the *summons* or *venire* which the statute required the justice to issue. *Ib.* 685
3. The record or proceedings are returned, or at least considered as returned in answer to a *certiorari* issued by a superior to an inferior tribunal, although the return itself states that a copy only had been sent up; and under our statute where the justice trying a forcible entry and detainer sends up the original papers, with a transcript of the proceedings, all duly certified, the circuit court should require the appellant to assign errors without awarding an alias *certiorari* to bring up copies of the original papers. —*Ib.* 685

FORTHCOMING BOND.

1. When the judgment is in the name of K. as guardian of C. and after a levy and forthcoming bond, on a *fi. fa.* pursuing the judgment another *fi. fa.* is issued on the bond, in the name of C. by his guardian K. the last execution is irregular, because of the change of plaintiffs, and should be quashed on motion. *Smith & Bowdon v. Knight*, 618

FRAUD.

1. When a note is taken from a person of weak intellect and an habitual drunkard, under suspicious circumstances, it is a strong badge of fraud, if the plaintiff does not make out a fair case, and good consideration—it being previously shown, the note was given on a settlement of accounts, and the presumption created, either that nothing, or a less sum was due than the note called for. *Hale, et al. v. Brown*, 87
2. When property is obtained without any, or for a grossly inadequate consideration, by a pre-concerted plan to effect the particular design by representing worthless things of value, it is not necessary for the injured

FRAUD—CONTINUED.

- party to offer to return the worthless thing, before his right of recaption attaches. *Mahone v. Reeves*, 345
3. To justify an inference of fraud, from the price given for a slave, in a purchase from an insolvent man, it should be clearly inadequate—evidently below the market price. The fair interpretation of the terms, “value, or about the value,” of a slave, is not much above or below the market price. *Prosser v. Henderson*, 484
4. When a title is acquired *bona fide* to a slave, it is not a badge of fraud, that the purchaser suffers him to go into the possession of a former owner of the slave, for a short time, although he is insolvent; he having parted with the title, and the slave having been out of his possession for two years previous. *Ib.* 484
5. Where a deed of trust was made by a debtor to a trustee to secure a creditor and sureties, the declaration by one of the sureties that the grantor made the deed to prevent his being compelled to pay a security debt, is not sufficient to enable a sheriff seizing the property, after its sale by the trustee to that surety, and a conveyance by him to another in trust for his creditors, to raise the question that the first deed is fraudulent as to the creditors of the grantor, in the absence of any other proof of fraud. *Gary v. Colgin*, 514
6. Where property is conveyed by deed of trust and sold by the trustee in a different manner than directed by the deed, a stranger to the deed cannot dispute the regularity of the sale, although the purchaser is guilty of fraudulent acts in connection with it, and has made no payment of the purchase money. *Ib.* 515
7. The rigid application of the principle, that the continuance of the vendor of personal property in possession after an absolute sale, is *prima facie* evidence of fraud, will not be enforced where a person other than the creditor purchases goods under a *fieri facias*, and permits the defendant therein to retain the possession for a short time, and for a purpose consistent with fair dealing. *Anderson v. Brooks*, 953

See Assignments, 2, 3.

See Evidence, 10.

See Husband and Wife, 6, 14.

FRAUDS, STATUTE OF.

See Attorney at Law, 1.

See Assumpsit, 5, 6.

GAMING AND STAKEHOLDER.

1. The act of 1807 declares void all promises, &c. by which parties stipulate to pay to each other, money or other thing of value upon the event of

GAMING AND STAKEHOLDER—CONTINUED.

- a horse race, or other description of gaming; consequently, where money thus wagered is deposited with a stakeholder, it may be reclaimed by either party before it is paid over, by a notice not to pay it; and it is not necessary to entitle the party giving notice to maintain an action against a stakeholder, where the latter afterwards paid it to the supposed winner.—*Ivey v. Phifer*, 535
2. No particular form of words is necessary to inform a stakeholder, that a party depositing money in his hands as a wager, objects to its payment to the supposed winner; any words expressive of a prohibition to pay, *absolutely or conditionally*, are sufficient to revoke the authority of the stakeholder to pay under any circumstances, or until the condition is performed.—*Ib.* 535
3. A promise in writing by one to pay double the value of a wagon and harness, which was delivered to him, in the event that James K. Polk was elected President of the United States over Henry Clay, in 1844, is a wager prohibited by the act forbidding betting on elections in this State, and cannot be recovered. *Givens v. Rogers, et al.* 543
4. One taking such a note, on the admission of the maker that it was good, and he would pay it, cannot recover, because the note itself disclosed the illegality of the consideration. *Ib.* 543
5. In a suit on such a note, against the maker and his sureties, a recovery cannot be had on the common counts, the wagon not being in the possession of the sureties. *Ib.* 543
6. A wager on the Presidential election, consummated by the execution of a deed for a tract of land by G. to T. and the execution by the latter, to the former of promissory notes, for the value of the land, promising to pay when James K. Polk was elected President of the United States, is forbidden by law, and both the deed conveying the land, and the notes are void. On the one hand, no recovery can be had on the notes, and on the other, the land may be recovered by the appropriate action. *Trammell & McCarty v. Gordon*, 656

GARNISHMENT AND GARNISHEE.

1. When the transferee of a debt is summoned in an attachment suit after the answer of the garnishee, he is compelled, on the issue with the attaching creditor, to show the debt was transferred to him previous to the service of garnishee process, and the court may require this question to be presented by the issue. *Camp v. Hatter*, 151
2. The notice to the transferee may be ordered at any time after the coming in of the answer, and before the cause is ended by the termination of the suit; therefore, an order at the same term when final judgment is rendered against the debtor, is regular, and sufficient to continue the cause against the transferee. *Ib.* 151

GARNISHMENT AND GARNISHEE—CONTINUED.

3. The mere production by the transferee of a note made by the garnishee, with an assignment on it by the attachment debtor, is not sufficient to prove the note was assigned previous to the service of the garnishee process. It is with the transferee to show when his interest was acquired.
—*Ib.* 151
4. A transferee contesting the creditor's right to condemn the transferred debt, is liable for costs, if the issue is found against him, and a judgment condemning the debt in the hands of the garnishee, to the payment of the judgment debt and costs, and giving costs against the transferee is regular. *Ib.* 151
5. In proceedings by garnishee process, *it seems* such demands only can be condemned, as would entitle the attachment or judgment debtor to recover in debt, or *indebitatis assumpsit*. *Walke v. McGehee*, 273
6. It seems that a statute which merely gives a remedy at law, where it could previously have been available in equity only, or *vice versa*, may consistently with the constitution operate retrospectively; but whether the act of 1841, which gives the remedy by garnishment to the creditor of a corporation against a stockholder, where the latter stipulates to pay his subscription for stock as calls are made for it, entitles the creditor to garnishee the stockholder for what is due for the unpaid stock where he has paid all the calls of the company, is an open question. *Paschall v. Whitsett*, 472
7. A corporation is subject to dissolution by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and non-user; and a stockholder of a corporation is not liable to the process of garnishment under the act of 1841, at the suit of its creditor after the dissolution of the corporate body. *Ib.* 472
8. The answer of a garnishee, that he had been informed and believed the corporation ceased to have "any legal existence" previous to the issuing of the garnishment, is equivalent to the assertion that it was dissolved; and if not negatived in the manner prescribed by the statute, will be taken to be true. *Ib.* 473
9. In proceeding against a garnishee after the rendition of a judgment *nisi*, two returns of *non est* to succeeding writs of *sci. fa.* will sustain a final judgment against him. *Armstrong v. Dargan & Mays*, 506
10. When one is summoned as a garnishee of joint judgment debtors, the service of the garnishment operates as the attachment of debts due to the defendants severally, and consequently there is no error in propounding an issue that the garnishee is indebted to one of the joint debtors. *Locket v. Child*, 640
11. The costs of the suit against the principal debtor do not constitute any part of the costs against the garnishee, but become part of the debt, and

GARNISHMENT AND GARNISHEE—CONTINUED.

- as such, are recoverable if the garnishee is indebted a sufficient sum to cover them as well as the principal debt. *Ib.* 640
12. A garnishment may be sued out on a judgment, though no execution has been issued on it. *Faulkner v. Chandler,* 725
13. If a garnishee indebted by note, have notice of its transfer, before he answers, he should state it, or if he acquires notice afterwards, within time to amend his answer before judgment is rendered thereon, he should make it known to the court; and if he fails to do so, he cannot avail himself of the payment of a judgment rendered against him as a garnishee, in defence to an action brought by the assignee of the note. *Crayton v. Clark,* 787
14. Where a judgment is rendered discharging a garnishee, without setting out his answer *in extenso*, but affirms that he has filed one which is the basis of the judgment, this is sufficient to authorize an appellate court to look to an answer found in the transcript, as a part of the record. *Price v. Thomason,* 875
15. The garnishee answered at the return of the garnishment, that he purchased of the defendant certain property, under a deed of trust to a third person to secure a sum of money of a greater amount than the value of the property, for which he executed his bonds for \$500, payable at future times, which are particularly stated; these bonds it was agreed might be discharged in cash, or by paying the vendor's debts. Previous to the service of the garnishment, the garnishee extinguished some demands against the vendor, but to what amount he is unable to state. The deed of trust is still an incumbrance on the property, and the debt, or a part of it, mentioned therein, is still unsettled. Garnishee may have received some things from the defendant that are not embraced by the deed of trust, but the value of these would not more than compensate him for services rendered to the defendant, and the board of his family before the service of the garnishment: *Further*, that he does not consider that he owes the defendant any thing; that he has not, nor did he have any of his effects in his hands when the garnishment was served; nor does he know of any person who is indebted to him, or has any of his effects: *Held*, that it cannot be intended that the answer was designedly evasive, or intended to avoid a legal responsibility; that although it should have been more precise and explicit, if possible to make it so, yet the defects in this respect, may be attributable to some other cause than an intention to deceive the plaintiff or impose on the court; that if the plaintiff was dissatisfied with it, he should have examined the garnishee or controverted its truth. Therefore, a judgment discharging the garnishee on such an answer, will not be reversed on error. *Ib.* 875
16. The amendment of a judgment discharging the garnishee *nunc pro tunc*,

GARNISHMENT AND GARNISHEE—CONTINUED.

by setting out his answer at length, which was previously a part of the record, is no ground for the reversal of the judgment. *Ib.* 876

GIFT.

1. Where the father, a man of wealth, six or seven months after the marriage of his daughter, and when she and her husband were leaving the father's house to settle themselves in a distant State, delivered to the son-in-law sundry slaves, but fewer in number than his estate authorized to advance as a patrimony, it will be presumed that the delivery was intended as a gift to the son-in-law, and it devolves upon the father to show that they were intended as a loan or otherwise. *Hoe v. Harrison*, 499
See Parent and Child, 3.

GUARDIAN AND WARD.

1. The court of chancery has power to appoint the father guardian of his child's estate, and after giving the requisite security, he may receive a personal legacy coming to his infant child. *Lang, et al. v. Pettus*, 37
2. The distinction in a judgment against a guardian, that it be levied of the goods and chattels, &c. of the ward in his hands, &c., is a mere clerical misprision, amendable on motion in the primary court, or in the supreme court at the costs of the plaintiff in error. *Sellers, &c. v. Smith*, 264
3. Where a note is payable to an individual *eo nomine*, as the guardian of an infant, she may maintain an action thereon in her own name, or after her marriage in the name of herself and husband; but if suit is brought in the name of the ward, by the guardian and her husband, it is not allowable to declare in the name of the guardian, or of herself and husband—adding a count for money had and received to their use. If the note was intended to evidence a debt due to the ward—*Quere*, could not the ward sue thereon by any guardian recognized by law? *Cox v. Williamson*, 343
4. *Quere*—Can a guardian appointed in one state, maintain an action in another state, for a cause in which the ward is interested? *Ib.* 343
5. The removal of a guardian from the State is a sufficient reason to displace him from the trust, whenever in the discretion of the court he as a non-resident would not have been appointed in the first instance. *Speight v. Knight*, 461
6. When a guardian is sought to be removed for this cause, he is entitled to fourteen days' notice of the application, and if personal service cannot be made of the citation, he may be called on by publication. *Ib.* 461
7. The validity of a guardian's appointment cannot be called in question in the subsequent proceedings by him for a settlement, or assigned as error on the record of settlement. Error in the appointment of a guardian, &c. can only be reversed in a direct proceeding on the appointment. *Ib.* 461

GUARDIAN AND WARD—CONTINUED.

8. In proceeding against a guardian, &c. who has removed from the State without making a settlement, he is entitled to three months' notice by publication of the day on which he is required to state his accounts. *Ib.* 461
9. *Quere*—Whether under the statute when a guardian, &c. has removed from the State, the orphans' court can proceed to decree the account stated by it at the same term when it is stated; or whether the guardian, &c. is not then to be cited to a final settlement as in other cases. *Ib.* 461
10. Where a guardian is cited to appear and state his account for final settlement, and omits to do so, it is the duty of the judge to state the account, and cause notice to be given to the guardian, that unless he appears at the next orphans' court, and file his account and vouchers for settlement, then the account of the judge will be reported for allowance and settled. It is error to state the account and allowance at the same term, and it makes no difference that the guardian is present when the account is settled by the judge and contests its items. *Hughes v. Ringstaff*, 563
11. *Quere?* Whether the guardian will be permitted to contest the items in the account stated by the judge, when he is in contempt by refusing to state the account himself. *Ib.* 564
12. *Quere?* Whether a guardian can be cited to a final settlement by his ward before majority, without having been removed from the trust; and also, whether on either annual or final settlement, the sum found due to the ward can be decreed to be paid to the register of the court. *Ib.* 564
13. Where a guardian invests the funds of his ward in lands, and after the ward comes of age, a receipt in full of the personal estate is given, or a settlement made with the orphans' court, omitting to account for the funds thus invested, the receipt or settlement will be conclusive, unless impeached for fraud, mistake or want of knowledge. *Myer, et al. v. Rives*, 760
 See Action, 1.
 See Court, Orphans', 4.
 See Execution, Writ of, 5.
 See Parent and Child, 1.

HEIRS, DEVISEES AND DISTRIBUTEES.

1. To a *sci. fa.* against an heir and devisee seeking to subject descended or devised lands to the payment of a judgment against the ancestor, it is a good plea that no lands have descended, &c. *Wilkinson v. Allen, et al.* 128
2. A posthumous child may claim by descent as an heir of its father, and may join with its elder brothers and sisters, in an action for the recovery of the possession of the lands descended. *Bishop's Heirs v. Hampton*, 254
 See Executors and Administrators, 20.

HUSBAND AND WIFE.

1. It is irregular to decree distribution in the name of the husband, only for

HUSBAND AND WIFE—CONTINUED.

- the wife's distributive share. Whether amendable in the appellate court, *quere.* *Petty v. Wafford*, 143
2. When one claims as assignee of a distributee, the sum due in this character, cannot be joined with a sum due to him in right of his wife. *Ib.* 143
 3. When a *feme covert* prays that her portion of an intestate's estate may be settled to her sole use, and the answer sets up that the intestate became the surety for her and another person as the administrators of the estate of her first husband, of which estate assets to a large amount came to the hands of the administrators, and that the co-administrator as well as the complainant's husband are insolvent, indemnity against the liability will not be decreed when the answer is not sustained by proof of the insolvency of the administrator. *Connally's adm'r v. Kavanaugh*, 169
 4. A conveyance being made of land and slaves, to a husband in trust for his wife and children, his possession of the property will be referred to the deed, and that he holds it as trustee merely, unless he does some act, demonstrating his intention to assert his marital rights over it. If he dies without manifesting such intention, and before any creditor has in his name asserted such right, the interest of the wife in the property will survive to her. *Terrell, et als. v. Green, et als.* 207
 5. The right of dower depending upon the wife's surviving the husband, may be gratuitously renounced in favor of her husband, or she may require something to be paid for it, or property to be conveyed to her separate use, as an inducement to her relinquishment. *Hoot, et al. v. Sorrell, et al.* 386
 6. Where the wife, as an inducement to relinquish her contingent right of dower, stipulates for the settlement of personal property to her separate use, which is worth half as much as the lands are sold for, the transaction will not be adjudged void, in the absence of proof implicating the wife in a want of good faith, merely because the property settled is of greater value than the consideration given for the settlement. *Ib.* 386
 7. The profits derived by the wife from her separate estate are her property, and may be disposed of, or invested by her as she pleases; and property which she acquires by purchase with her income, is not subject to the payment of his debts; especially if she has not allowed it to go into his hands, or be subject to his control. *Ib.* 386
 8. Where the husband furnishes lumber, which the wife voluntarily allows to be used in erecting buildings on her separate estate, if the husband is in embarrassed circumstances at the time, this will be considered a gift to the wife in fraud of his creditors, and the latter may thus far make the wife's estate liable to pay their demands. *Ib.* 386
 9. If the husband merely expends his personal labor in the improvement of his wife's estate, the estate is not thereby made a debtor to the husband,

HUSBAND AND WIFE—CONTINUED.

nor can the creditors of the latter charge it with the value of the labor.—

Ib. 386

10. Upon a bill by the creditors of the husband to charge the wife's estate, (among other things,) with the value of lumber furnished by the husband towards its improvement, the lumber must be estimated according to its value when the bill was filed; and to collect the amount with which the wife's estate is charged, the decree should not direct a sale, but the estate should be leased for term a sufficiently long to extinguish the charge.—

Ib. 386

11. The duty of maintaining the wife devolves on her husband, though she have a *dower estate* in virtue of a previous marriage. During the *joint lives* of husband and wife, the husband has the sole control and management of such an estate; and consequently an interest for that period, which may be levied on and sold under a *fieri facias* to satisfy a judgment against him. *Neil v. Johnson*,

615

12. The mere circumstance that one loaning money takes a note payable to a married woman in trust for himself, will not give jurisdiction to a court of equity of a suit by his executor against the debtor and the husband and wife—there being no allegation in the bill that husband or wife interpose any impediments to a recovery at law by suit in their name. *Rowland, et*

al. v. Logan, 663

13. Under the Spanish law in force in a portion of this state previous to its acquisition from France, the husband could make a valid sale of the paraphernal estate of the wife with her consent, and her joining in the deed is evidence of such consent, although that is not executed with the formalities required to a public act. The deed is binding on the parties and their heirs as a private act. *Heirs of McVoy v. Hallett and Walker*,

864

14. Where the purchaser of slaves at a sale under a *fieri facias* permits them to remain in the possession of the defendant in execution for a short time, that the wife of the latter may have the benefit of their services, and while thus situated settles them *in trust* for the *separate use of the wife and her children*, such possession by the husband will not make the purchase under the *fi. fa.* fraudulent, so as to subject the slaves to an execution against the husband's estate which was levied after the settlement was executed.

Anderson v. Brooks, 954

15. A deed conveyed real and personal property to a trustee as a provision for the support and maintenance of the mother (a married woman) and the support and education of her children—declaring that the trustee shall hold and possess the same, *in trust for the sole use, benefit and behoof of the mother and her children, and shall not sell or charge it*: Held, that the deed invested the wife and her children with the beneficial estate, and that the husband had no interest in virtue of his marital rights, which could be subjected to the payment of his debts. *Ib.*

954

HUSBAND AND WIFE—CONTINUED.

16. A deed by which the husband in general terms gives slaves to his wife, in consideration of love and affection, does not divest the estate of the husband in a court of law, and a possession of the slaves acquired by the wife after the death of the husband, as his personal representative, does not invest her with an interest which will inure to her administrator, so as to enable him successfully to defend an action of detinue brought by the administrator *de bonis non* of the husband, for the recovery of the slaves. Such a deed is merely void at law, and can only be made effectual in equity. *Gamble v. Gamble's adm'r*, 966
17. It cannot be assumed as a legal conclusion, because a wife, who is the personal representative of her husband, produces a deed by which the latter purports to give to her certain slaves, without further proof of the delivery of the deed or slaves, that, therefore the possession of the deed was parted with by the husband for her benefit. The fact of the delivery should be referred to the jury for their determination. *Ib.* 966
- See Conflict of Laws, 1.
- See Contracts and Agreements, 5.
- See Witness, 4.

INDICTMENT.

1. To constitute the crime of an "attempt to poison" a white person, by a slave, there must be an actual attempt to poison, by the administration of some poisonous drug, or substance, calculated to destroy human life.—*State v. Clarissa*, 57
2. An indictment under this statute must allege, that the substance administered was a deadly poison, or calculated to destroy human life. An indictment which alleges the administration of the seed of the Jamestown weed, but does not contain an allegation that it is a poisonous substance, calculated in its effects to destroy human life, is insufficient to sustain a judgment. *Ib.* 57
3. In an indictment for incestuous adultery, it is unnecessary to charge a common knowledge of the relationship, if the charge of knowing of the relationship is made against the party indicted. *Morgan v. The State*, 289

INDIAN AND INDIAN TRIBES.

1. The 9th section of the act of 1832, which requires that on contracts made with an *Indian*, the consideration shall be proved by two credible witnesses, extends not only to Indians of the full blood, but to the descendants of an Indian woman and a white man. *Wall v. Williams, &c.* 826
2. Marriages among the Indian tribes must generally be considered as taking place in a state of nature, and if according to the usages and customs of the particular tribe, the parties are authorized to dissolve it at pleasure,

INDIAN AND INDIAN TRIBES—CONTINUED.

the right of dissolution will be considered a term of the contract; and either party may take advantage of this term, unless it be expressly or impliedly waived by them, or they may perhaps acquire such relations to society as will give permanency to the contract, and take from them the right to annul it. *Ib.* 827

3. The act of 1832 extending the jurisdiction of this State over the Indian territory does not take from a marriage between members of the Choctaw tribe its dissoluble quality at the pleasure of the parties: nor can the asking a reservation under the treaty of Dancing Rabbit Creek, the acceptance of a patent from the United States for the land embraced by it, and the continued cohabitation in this State for more than five years after the ratification of the treaty, and the departure of the mass of their tribe to the west, have that effect. The concurrence of all these facts will not take from a reservee, his citizenship as a Choctaw—the treaty securing the right of resuming his *status* in the tribe at pleasure: nor will it warrant the assumption that the marriage was consummated in contemplation of a residence in Alabama. *Ib.* 827

INDORSEMENT.

1. It is not necessary to fill up a blank indorsement by inserting the plaintiff's name, although the declaration describes him as an indorsee. *Sawyer's Adm'r v. Patterson*, 523
2. Where a note loses its assignable quality by a judgment having been recovered thereon against one of the makers, in the name of the assignee, the insertion of the name of another person in the indorsement of the payee which was previously blank, is a nugatory act, and the name thus inserted may be stricken out at the trial of a suit brought by the assignee against another maker. *Ib.* 523
3. The act of 1837, which inhibits the assignment of a promissory note by delivery merely, so as to permit the assignee to maintain an action thereon as the bearer, cannot be extended by construction to *blank indorsements*, or to an indorsement which directs the contents to be paid to the bearer, without indicating him by name. *Ib.* 524
4. In order to pass the *legal* interest in a promissory note to a third person, and to invest him with a right of action in his own name, the transfer must be made by indorsement; and the indorsement of a receipt given by an attorney at law for a note placed in his hands for collection, will not pass to the assignee the legal title to the note, although the attorney, by an indorsement on the receipt, promised to pay to him the proceeds when collected: and such an assignment does not impose upon the assignee the necessity of pursuing the same steps as are necessary to charge an indorser. *Gookin v. Richardson*, 889

INDORSEMENT—CONTINUED.

See Chancery, 26.

See Pleading, 22.

See Trust, and Cestui Que Trust, 7.

INDORSER AND INDORSEE.

1. An innocent holder, for value, of an acceptance, improperly made by a member of a firm, by his indorsement of the bill, transfers all his rights to his indorsee, who will not therefore be required to show when he acquired the bill, or that he gave value for it. *Pearson v. Howe*, 370
 2. An assignment of a note to W. N. H., "with said W. N. H. to try the insolvency of P. H. May," (the maker of the note,) imposes on the assignee the burthen of establishing the insolvency of May, by an action on the note against him. *Hines v. Mullikin*, 634
- See Assumpsit, 7.
 See Evidence, 31.
 See Pleading, 10.

INFANT AND INFANCY

See Executors and Administrators, 15.

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. The assent of a grantor to the provisions of a deed conveying property in trust for his benefit, is to be inferred from his acceptance of the deed at the time of its execution. *Pinkard v. Ingersol, et al.* 9
2. Where an attorney charges himself with an amount collected for his principal, and charges the principal with his fee, the jury may infer a promise from the attorney to pay the balance. *Cameron, Ex'r, v. Clark, Smith & Co.* 259
3. Where a promissory note is dated at "Macon," and "payable at either of the banks in Macon," it cannot, in the absence of an allegation or proof, be intended that "Macon" is in another State, so as to devolve upon the plaintiff the necessity of proving the rate of interest abroad; especially as there is a county, and perhaps several villages called "Macon" in Alabama, though there is no *incorporated bank* in either. *Smith v. Robinson*, 270
4. Where leave is given to file a declaration upon setting aside a non-suit, if one is found in the transcript, corresponding with the cause of action indorsed on the writ, it will be presumed to have been filed previous to the rendition of the judgment. *Ib.* 270
5. When the judgment entry recited that the plaintiff came by attorney, and "service being proved, and discontinued as to Elrod, on whom process was not served," it must be intended that the acceptance of the service of a writ as indorsed upon it, and subscribed by the defendants against whom

INTENDMENTS AND LEGAL PRESUMPTIONS—CONTINUED.

- the judgment is rendered, was shown to be genuine. *Spence, et al. v. Rutledge, Adm'r*, 590
6. It is not necessary in declaring on a writing obligatory, to alledge that it was delivered to the obligee—delivery will be presumed from possession by him. *Ib.* 590
7. Where the assignee of a note simultaneously with the assignment, receives of a third person a note for the amount which he advanced for him, and which induced the assignment, it cannot be assumed that such note has been paid; but if it has, the assignee may still maintain an action against the assignor for the benefit of the party paying it. *Brown v. Isbell*, 1010
8. F. claimed under a conveyance dated in 1798, and conveyed to O. in 1801; title was shown in F's grantor, commencing in 1788. There was no proof of possession adverse to F. or his vendor, and F. was in possession at the time of the sale by him in 1801: *Held*, that it might be intended by a jury that F's possession commenced in 1798, and *perhaps*, that his grantor occupied the land under the conveyance of 1788, so as to complete the bar of the statute of limitations when the vendee of O. was ousted more than twenty years after F's title commenced. *Doe ex dem. Farmer's Heirs v. Eslava*, 1029
- See Corporations, 6.
- See Error, Writ of, 10.
- See Evidence, 14.
- See Executors and Administrators, 14.
- See Fraud, 1.
- See Husband and Wife, 17.
- See Principal and Surety, 15.
- See Set-off, 1.

INTEREST.

1. Where a promissory note is dated at "Macon," and "payable at either of the banks in Macon," it cannot, in the absence of an allegation or proof, be intended that "Macon" is in another State, so as to devolve upon the plaintiff the necessity of proving the rate of interest abroad; especially as there is a county, and perhaps several villages, called "Macon" in Alabama, though there is no *incorporated bank* in either. *Smith v. Robinson*, 270
2. An administrator is chargeable with interest, from the time money of the estate comes to his hands, unless he makes oath that he has not used the funds, and if he does, it may be controverted, and an issue made to try the fact. *Parker and Wife v. McGaha, Adm'r*, 521

JUDGMENT AND DECREE.

1. This court will not permit error to be confessed upon a power of attorney alledged to be executed by the defendant in error for that purpose, she being a non-resident, and her attorney in this court making affidavit that he believed it was fraudulently obtained; but will leave the parties to seek their redress in the ordinary mode. *Beavers and Jemison v. Smith*, 20
2. In an action against an indorser, it is competent to render a judgment final by default, without the intervention of a jury. *Smith v. Robinson*, 270
3. When land is conveyed by a deed which is not registered, but the purchaser enters and holds under the deed for several years, after which a stranger enters on the possession, and holds without any connection with the title, these facts are sufficient notice to prevent a lien from attaching to the land by a judgment obtained against the vendor of the land six years after his sale and conveyance, and a purchaser under the judgment obtains no title, being charged with notice by the outstanding possession, existing at the time of his purchase. *Powell v. Allred*, 318
4. A judgment was recovered, and an execution issued thereon levied on property to which a third person interposed a claim; pending the trial of the right of property, the judgment was reversed, notwithstanding which the trial proceeded, and the property was condemned: Held, that the judgment of condemnation beyond the amount of cost in the proceeding in which it was rendered, could not be enforced by execution—that it being consequential and dependent, the reversal of the judgment in the principal case, took from it a necessary and indispensable foundation. *Clements v. Elliott*, 360
5. The judgment lien upon land is not impaired by mere delay, and the senior creditor who has within the year had his execution issued and returned *nulla bona* is to be preferred to a subsequent attaching creditor, if he places an execution in the sheriff's hands before a sale of the land. *Turner v. Lawrence*, 426
6. A judgment in favor of the "officers of the circuit court of Mobile," is a nullity, and no writ of error can be sued upon it. *Patterson, et als. v. Officers Cir. Ct. Mobile*, 740
7. Where, upon the trial of the right of property under the statute, it appears that in a suit in chancery between the same parties, certain slaves were adjudged to be liable to satisfy the plaintiff's judgment, the decree will be conclusive between the parties in respect to the subject matter in all other courts; but if the question of liability to the judgment was not litigated by the pleading, the decree will not conclude the controversy upon it, although the register may have reported he sold the slaves under the decree, and the chancellor confirmed his report. *Anderson v. Brooks*, 953

See Amendment, 4.

See Chancery, 1, 28.

JUDGMENT AND DECREE—CONTINUED.

- See Debtor and Creditor, 3,
 See Error, Writ of, 5, 11.
 See Executors and Administrators, 14.
 See Husband and Wife, 10.
 See Jurisdiction, 1.
 See Lien, 2, 3.
 See Practice at Law, 15, 17.

JURISDICTION.

1. The courts of ordinary of the State of Georgia, being courts of limited, and special jurisdiction, have no power to order the sale of the slaves of an intestate, unless the administrator makes the representation, which the statute requires. This must appear from the record; and if it does not, the court was without jurisdiction, and the sale void. *McCartney, et al. v. Calhoun, et al.* 110
2. *Semble*: Where the amount received by a justice of the peace in virtue of his office, together with the damages given by statute for failing to pay it over, exceed fifty dollars, the circuit court may entertain jurisdiction of a motion against him. *Ledbetter v. Castles, et al.* 149
 See Practice in Chancery, 22.

JURY AND JUROR.

- See Criminal Cases, Proceedings in, 2.
 See Court, Orphans', 8.

JUSTICE OF THE PEACE AND SURETIES.

1. The act which gives a summary remedy against a justice of the peace, for the failure to pay over on demand any money received or collected by virtue of his office, does not extend to their sureties, so as to authorize a judgment to be rendered against them with their principals on motion: consequently, a motion for judgment in such case, against a justice and his sureties, is unauthorized, and may be denied *in toto*. *Ledbetter v. Castles, et al.* 149
 See Appeals and Certiorari, 2.
 See Jurisdiction, 2.

LANDLORD AND TENANT.

- See Ejectment and Trespass to Try Title, 2.

LAND TITLES SOUTH OF LAT. 31.

1. Where, previous to the year 1800, the Spanish Governor of Louisiana, upon a petition praying the grant of a tract of land, directed the comman-

LAND TITLES SOUTH OF LAT. 31—CONTINUED.

- dant at Mobile to put the petitioner in possession of the tract, and to forward the proceedings of survey, for the purpose of procuring the petitioner a title in due form: *Held*, that the concession of the governor was a mere gratuitous assent to the prayer of the petition, and gave nothing more than a permission to occupy; the fee remained in Spain until the survey was made in due form, the fact communicated to the governor, and the evidence of title furnished. *Doe ex dem. Kennedy's Ex'rs v. Jones*, 63
2. An inchoate grant by Spain, previous to the treaty of St. Ildefonso, only imposes upon the United States a political obligation to validate it so far as it is binding in conscience; but until it is confirmed, it confers upon the grantee no right which an American court will recognize. A confirmation by Spain subsequent to the treaty by which it yielded up its right to the soil, is wholly inoperative to affect the title of others, acquired after the original grant. *Ib.* 63
3. It is allowable to show on a trial at law, that a grant of land at Mobile, purporting to have been made by an officer of Spain, while that government was in possession of the country was unauthorized, and consequently void. *Ib.* 64
4. Where a commission for the examination of claims under Spanish grants, &c, makes a special report on a grant which is void, and an act of Congress is passed confirming the report, and providing for the location and survey of lands to which the title is thereby confirmed; but neither the report nor the act ascertained the limits or boundaries; in such case reference must be had, either to the survey made under the act, or to the patent consequent upon the survey, for the purpose of ascertaining the location of the land. *Ib.* 64
5. The legislative acts of 1803, 1816 and 1818, in respect to the keeping and translating of the Spanish records, makes duly authenticated copies of such records evidence, and dispenses with the production of the originals. *Doe ex dem. Farmer's Heirs v. Eslava*, 1028
6. *Semle*: An incomplete claim to land under Spanish authority, may be admitted as evidence for the purpose of showing that Spain had asserted a title to the premises in controversy, or for the purpose of laying a predicate, from which it may be presumed that the defendant and those under whom he claims, had been in possession for twenty-years, so as to give him a title by prescription; although the evidences of title had not been recorded as directed by the acts of Congress of 1805, 1806, 1807, 1812. —*Ib.* 1028
7. A petition addressed to the Spanish Governor of Louisiana, during the time the country was in the possession of Spain, asking the grant of a tract of land, and the order of the Governor thereon, was *prima facie* deposited, if not registered in a public office, and became a public archive of the

LAND TITLES SOUTH OF LAT. 31—CONTINUED.

- Province; consequently, a copy of such a document is admissible evidence. *Ib.* 1028
8. Even if it be doubtful whether a conveyance of a house in Mobile during Spanish times, passed the interest of the grantor in the lot on which it was situated, yet if the grantee and those claiming under him have continued to occupy the premises, the conveyance will be sufficient to give color of title. *Ib.* 1029
9. The treaty of 1793, by which Great Britain retroceded to Spain the Floridas, &c., stipulates that "*British inhabitants* or others who may have been *subjects of the King of Great Britain* in the said provinces," may retire in full security, sell their estates, and remove their persons and effects without restraint; and prescribes a time within which the emigration of such persons shall take place, unless prolonged by a royal order of Spain. If, therefore, a person coming within either of these classes failed to dispose of his estate in land, or to obtain a confirmation of his right to enjoy it as provided by the treaty and consequent royal orders, but left the country and resided abroad, his claim is forfeited to Spain, and might be re-granted by Spanish authority during the period of its rightful dominion over the territory. *Ib.* 1030
- See Conflict of Laws, 5.
- See Evidence, 58.

LEASES AND RENTS.

1. The service of an injunction at the suit of a stranger, asserting a title to a ferry in the possession of a lessee, restraining him from interfering in the use of the ferry, is not such a disturbance as amounts to an eviction, and therefore will not prevent the lessor from recovering rent when the bill is dismissed. *Ricketts, et al. v. Garrett,* 806
2. Although a sheriff serving an injunction may have no authority to expel one from the possession of a ferry, or put another in, yet if he does so, the lessee may consider it a lawful expulsion of the plaintiff in the suit is invested with a paramount title to his lessor. *Ib.* 807

LESSOR AND LESSEE.

See Leases and Rents, 1, 2.

See Roads, Bridges and Ferries, 4.

LIEN.

1. The lien of the vendor of land is a secret trust, and although it will be preferred to any other subsequent equal equity, unconnected with a legal advantage, or equitable advantage which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity, connected with

LIEN—CONTINUED.

such advantage. If therefore a vendee who has a perfect conveyance sell the land to another person who has no notice that he has not paid the purchase money, and take from the purchaser a note for the purchase money, which is assigned for a valuable consideration by the vendee, before the sub-vendee, or the assignee has notice that the original vendor has not been paid, the equitable lien of the latter will be lost, and the assignee will be entitled to the money due on the note. And a different rule of law will not be applied, although the sub-vendee after he was informed of the non-payment by his immediate vendor, said he would not pay his note, unless he was made safe; nor will the assignee's right to retain the money be impaired because he gave to the maker of the note an indemnity to induce him to pay it. *Houston v. Stanton*, 413

2. A suit in equity by a creditor to set aside a fraudulent deed and have the land of his debtor sold, gives to the complainant a lien which will not be defeated by a *bona fide* sale by the defendant, or under an execution on a judgment which is not a superior and continuing lien against other judgment creditors who use greater diligence. *Dargan v. Waring, et al.* 988
3. The neglect of the plaintiff in a judgment to sue out execution from term to term after the return of the original *fi. fa.*, will postpone his lien to a junior judgment creditor, who has instituted a suit in equity to subject the real estate of their debtor to the satisfaction of his judgment. *Ib.* 989

See Assignments, 1, 5.

See Contracts and Agreements, 6.

See Judgment and Decree, 5.

See Mortgagor and Mortgagee, 6.

See Notice, 3.

See Partners and Partnership, 1.

LIMITATIONS AND NON-CLAIMS, STATUTES OF.

1. An admission of indebtedness, in a precise, ascertained sum, is not an open account, or barred by the statute of limitations of three years. *Drinkwater v. Holliday*, 134
2. The commencement and continued prosecution of a suit, within eighteen months from the grant of letters testamentary, is a presentation of a claim against the estate of the deceased, within the meaning of the statute. *Hunley's Ex'rs v. Shuford*, 203
3. Where a surety about to be sued, and before the statute of limitations has created a bar, hands to the creditor for suit, a note which had been executed to him by the principal debtor as an indemnity, the effect is such an admission of indebtedness on his part, as will postpone the operation of the statute six years longer as to him. *Russell v. La Roque & Hatch*, 352
4. The statute forbidding an action to be brought against the sureties of a

LIMITATIONS AND NON-CLAIMS, STATUTES OF—CONTINUED.

- sheriff, or other public officer, after the lapse of six years, for a misfeasance, or malfeasance committed by him (Clay's Dig. 329, § 90,) commences to run, when the responsibility of the surety is conclusively ascertained. *Governor v. Stonum, adm'r*, 679
5. In the case of the collection of money by the sheriff, by execution, the statute commences running in favor of the surety, when the sheriff returns the execution satisfied. *Ib.* 679
6. Where a surety is sued by the common creditor, and the statute of limitations runs out pending the suit, this is no defence by a co-surety to a motion by the surety against whom the creditor has obtained judgment. The liability as between sureties does not accrue until one has paid the common debt. *Broughton v. Robinson*, 923
7. *Semle*: A person in possession of land cannot be put to his action, entry, or claim, nor barred by the statute of limitations; but to make a possession adverse it must be under claim of a right to occupy the premises. *Doe ex dem. Farmer's Heirs v. Eslava*, 1029
8. To perfect the bar of the statute of limitations, the possession must be uninterrupted; yet the interruption of mere trespassers, if unknown, will not affect the possession; but if known and repeated without legal proceedings being instituted, it is said they become *legitimæ interruptiones*, and are converted into adverse assertions of right, which if not promptly and effectually litigated, defeat the claim of rightful prescription. If, therefore, a testator is expelled by a proceeding for a *forcible entry and detainer*, &c., promptly instituted, the statute may not be impeded in its course; but if the possession was preceded by a peaceable entry under a claim of right, the statute will be arrested in its progress, though the party entered upon regains the possession by the successful prosecution of an action of ejectment or other similar proceeding. *Ib.* 1029
9. When the statute of limitations has completed a bar, it gives to the party in whose favor it has run, a right of entry upon which he may prosecute ejectment, or if sued, defend himself. *Ib.* 1030
- See Evidence, 12.
- See Intendments and Legal Presumptions, 8.
- See Land Titles South of Lat. 31, 6, 8.
- See Statutes, 1.

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution, in procuring the plaintiff to be indicted, &c. the defendant may repel the imputation of having prompted the prosecution, by proof that the persons who appeared as prosecutors before the grand jury, first took the advice of a lawyer upon the facts, and were informed by him that the indictment could be sustained. *Chandler v. McPherson, et al.* 916

MALICIOUS PROSECUTION—CONTINUED.

2. Although the defendant in an action for a malicious prosecution may not be able to show a probable cause for prosecuting the plaintiff, or the plaintiff may prove a state of facts from which the want of it is inferable, yet if the defendant acted under an honest belief that the plaintiff was guilty of the offence for which he was charged, no recovery can be had against him. *Ib.* 916

MANDAMUS.

See Practice at Law, 16.

MARRIAGE AND MARRIAGE SETTLEMENTS.

1. Natural children are within the statutes defining the degrees within which marriage is prohibited. *Morgan v. The State*, 289
See Indian and Indian Tribes, 2, 3.

MORTGAGES.

1. Where a debtor in the first instance gives a mortgage on slaves, to secure his creditor, and the creditor afterwards takes from him another mortgage on the same and other property, extending the law day, and securing other creditors, the acceptance of the last mortgage creates an implied contract not to proceed on the first, and therefore the possession held by the creditor, of slaves purchased at a sale under the first mortgage is not adverse, so as to render a sale by the trustee under the second mortgage void on account of an adverse possession. The title of the creditor acquired by his purchase, is subordinate to the last mortgage. *Billingsley v. Harrell*, 775
See Corporation, 5.

MORTGAGOR AND MORTGAGEE.

1. The act of 1845, rendering mortgagors, or defendants in execution incompetent witnesses in *trials of the right of property*, does not cover the case of a mortgagee suing a subsequent purchase from the mortgagor.—*Dearing v. Windham*, 204
2. A mortgage, though not recorded, is good as between the parties, and therefore binding on the administrator of the mortgagor, unless some creditor of the mortgagor, without notice of the mortgage, has obtained a judgment, and acquired a lien on the mortgaged property. *Andrews and Hall, Adm'rs, v. Burns, Adm'r*, 691
See Deeds and Registry of, 2.
See Mortgages, 1.
See Witness, 1.

NOTARIES PUBLIC, PROBATE, &c.

1. In a suit commenced by notice and motion at the instance of the bank a-

NOTARIES PUBLIC, PROBATE, &c.—CONTINUED.

gainst the second indorser of a bill drawn in Alabama on a firm in New Orleans—on a trial before the jury, the plaintiff offered the protest of a bill agreeing in all respects with that described in the notice, and then produced by him, save only, that the bill described in the protest, and copied thereon, purported to be addressed to “Gamble & Murrah,” and the original bill was addressed to Gamble & Murray: *Held*, that although the protest, unaided by other testimony, may be insufficient, yet it should be admitted that the plaintiff may show some or all of the following facts, or others of a kindred import, viz: that “Murrah” was pronounced “Murray;” that there was no such house in New Orleans as the address of the bill indicated; that “Gamble & Murrah” were the factors or correspondents of the drawer in that city; that he was in the habit of drawing on them; that “Murrah” was sometimes written “Murray” by persons who were not accurate spellers. Such evidence would have supplied the defects of the protest, and show that it was intended to apply to the bill sued on. *Branch Bank at Decatur v. Rhodes*, 283

2. Where the copy of the bill indorsed on the protest differs in some one or more words from that declared on, and produced at the trial, the protest should, notwithstanding, be allowed to go before the jury, that the plaintiff may show, by other testimony, the identity of the copy with the original adduced. *Leigh v. Lightfoot*, 935
 3. Where the declaration alledges that the bill declared on was drawn at Leighton, in Lawrence county, on the drawees at Mobile, and the bill produced at the trial was dated Leighton, and addressed to the drawees at Mobile, it sufficiently appears that it is an *inland bill*, which need not be protested to entitle the plaintiff to recover the sum expressed on its face with interest; but unless there is a protest the statute damages cannot be recovered. *Ib.* 935
- See Evidence, 51.

NOTICE.

1. In a summary proceeding by the bank against its debtor, the notice alledged that the drawer and indorser were indebted to the plaintiff by a bill of exchange, purchased under the first section of the act of 1843, and informed them that a motion would be made against them for the amount of money due and unpaid on the bill, together with the interest and damages at the rate of *thirty per cent.* which shall have lawfully accrued thereon. The damages prescribed by the statute on one description of bill to which it referred was thirty, and on another five per cent. *Held*, that as the plaintiff upon proof of default and notice might recover at least five per cent. damages, the notice was not bad on demurrer. *Riggs, et al. v. The Bank of the State*, 183

NOTICE—CONTINUED.

2. The notice which the law requires to be given in summary proceedings, is sufficient, if it describes the debt upon which the motion is to be made with reasonable certainty. *Colgin v. The State Bank*, 222
 3. When land is conveyed by a deed which is not registered, but the purchaser enters and holds under the deed for several years, after which a stranger enters on the possession, and holds without any connection with the title, these facts are sufficient notice to prevent a lien from attaching to the land by a judgment obtained against the vendor of the land six years after his sale and conveyance, and a purchaser under the judgment obtains no title, being charged with notice by the outstanding possession, existing at the time of his purchase. *Powell v. Allred*, 318
 4. A notice to a sheriff, setting forth a demand, need not state the day on which the demand was made. *Spence, et al. v. Rutledge, adm'r*, 557
 5. It is not necessary to alledge in a notice, that the plaintiff resided in the county where the judgment was rendered. If he resides in a different county, it is a matter of defence to the sheriff, who by making that proof, will cast on the plaintiff the necessity of proving a personal demand, or by an order in writing. *Ib.* 557
 6. Where there is a variance of two dollars between the execution as described in the notice, and the one offered in evidence, it may be amended in the court below, otherwise it will be fatal on error. *Ib.* 558
- See Bills of Exchange and Promissory Notes, 7.
 See Evidence 56.
 See Set-off, 5.

NOVEL AND DIFFICULT QUESTIONS.

See Practice at Law, 1.

OVERSEER AND HIS EMPLOYER.

1. If an overseer so acts in the business of his employer as to authorize his dismissal, yet if the employer, with a knowledge of the fact, overlooks the impropriety, and retains the overseer in his service for months, he cannot then make such misconduct an excuse for discharging him, in the absence of a cause subsequently occurring. *Martin v. Everett*, 375

PARENT AND CHILD.

1. An infant having no guardian and living with his mother, a widow, and going to a school in the neighborhood, will be presumed to be sent by her if the contrary is not shown. *Tilton v. Russell*, 497
2. Where the father, a man of wealth, six or seven months after the marriage of his daughter, and when she and her husband were leaving the father's house to settle themselves in a distant State, delivered to the son-

PARENT AND CHILD—CONTINUED.

- in-law sundry slaves, but fewer in number than his estate authorized to advance as a patrimony, it will be presumed that the delivery was intended as a gift to the son-in-law, and it devolves upon the father to show that they were intended as a loan or otherwise. *Hoe v. Harrison*, 499
3. If a parent, before sending property home to his son-in-law, declares his intention that it is a loan, and not an absolute gift, and about the same time, and whilst he retains the possession of the property, makes his will, in which the same intent is declared, the will may be given in evidence to prove the intent. *Miller v. Eatman*, 609
- See Chancery, 10.
- See Guardian and Ward, 1.
- See Executors and Administrators, 1.

PARTNERS AND PARTNERSHIPS.

1. Articles of agreement were entered into, between three brothers, which recited that they had *previously agreed to be equal sharers and partners in the product of their own labor and those under their care; and to bear equally the expense of carrying on a farm, raising stock, purchasing land, negroes and other property, whether jointly or individually.* The articles then provided for the continuance of the partnership, and extended it to all business in which either of them might engage, and stipulated that if either of the brothers died before a final adjustment and division of the property owned by them *jointly or individually*, the survivor or survivors (if one, or two of them died before such adjustment and division) should *heir* or inherit all the property, after a liquidation and final settlement of the debts or lawful claims against all or either of them: *Held*, that under this agreement, lands purchased upon *joint account*, or in the name of the brothers *individually*, inured to the benefit of the partnership; that if one of the partners purchased lands in his own name, and sold them, taking a note to himself for the purchase money, such note vested in the partnership, at least in equity, and upon the death of the payee, the surviving partners might file a bill in their own names for the enforcement of the equitable lien against the lands. *Houston v. Stanton and Stanton*, 412
2. An ostensible partner may maintain an action in his own name, without joining a dormant partner, although the latter was known to the defendant when the debt was contracted, and actually sold him the goods, for the price of which the action is brought: COLLIER, C. J. was, however, of opinion, that a partner who made himself known to the defendant at the time the debt was contracted, was not dormant as it respected the defendant, and should have joined in the action against him. *Monroe v. Ezzell*, 603
3. In a suit by two as late partners, it is admissible for the defendant, on the general issue, to prove that no partnership existed at the time of the con-

PARTNERS AND PARTNERSHIPS—CONTINUED.

- tract. The effect of the act of 1839 (Dig. 324, § 68,) is to revive the rule declared in *Davis v. Smith*, 2 Stewart, 222, and overruled in *Hunley v. Lang*, 5 Porter, 154. *Starke & Moore v. Kenan, Ex'r.* 818
4. Declarations by one of two joint partners, that the other was not his partner at the time of the alledged contract, is admissibl evidence. *Ib.* 818
- See Chancery, 21.

PAYMENT.

1. T. being indebted to S, in a sum of money secured by note, left the amount in the hands of L. & L. of Mobile, to take up the note. On being written to by the attorneys of S. for the money, T. informed them of the deposit with L. & L. and asked them to call and receive the money. After this, the attorneys of S. brought suit against L. & L. in the name of S. and recovered judgment, but which was not satisfied, they being insolvent: *Held*, that these facts did not establish a payment of the debt. *Sledge, Ex'r, v. Tubb,* 383
2. If the maker of a note makes a partial payment thereon to the payee, which the latter agrees to indorse on the note, but instead of doing so, brings suit and recovers judgment for the full amount of the note, which is satisfied, the maker cannot maintain an action for the partial payment, but should have availed himself of it as a defence *pro tanto* to the suit of the payee against him. *Mitchell v. Sanford,* 695
- See Action, 10.
- See Intendment, and Legal Presumption, 7.

PLEADING.

1. In an action by a female plaintiff upon a breach of promise to marry without reference to time, an allegation that the defendant had married another woman previous to the institution of the suit, is equivalent to an averment that the plaintiff had offered to marry him and her proposal was rejected; or rather is a substitute for it. *Clements, &c. v. Moore,* 35
2. Where the contract was to marry in a reasonable time, it is sufficient for the female suing for a breach to alledge her readiness to marry the defendant, that a reasonable time had elapsed, the defendant's failure to marry her, and his continued neglect and refusal to do so. *Ib.* 35
3. To a *sci. fa.* against an heir and devisee seeking to subject descended or devised lands to the payment of a judgment against the ancestor, it is a good plea that no lands have descended, &c. *Wilkinson v. Allen, et al.* 128
4. Where the replication to a plea of the pendency of another action denies the existence of the record, it should conclude with a verification by the record; but if it goes farther and affirms, that if there was another suit, the record of which would show it to be identical with that to which the

PLEADING—CONTINUED.

- pleading applies, yet in fact the causes are different ; or in other words, if it be so framed as to allow the plaintiff, upon the production of a record by the defendant which would support his plea, to show that the matter in controversy in the suit first instituted was not identical, then it should conclude to the country. *Williams v. Spears*, 138
5. Where the defendant pleads the existence of a record, it is not necessary for the plaintiff to new assign in order to let in proof of an extrinsic fact, which does not contradict, but merely limits the operation of the record. *Ib.* 138
6. Where a plea to a motion against the sheriff goes to the default, and it is not stated by whom pleaded, it will be considered as the plea of the sheriff. *Glover, &c. v. Chandler, et al.* 161
7. When a motion is made against a sheriff and his sureties at the instance of the clerk of the supreme court for failing to return an execution, it is not essential the pleas asserting the return of the execution and payment should be verified by oath. *Ib.* 161
8. A decree in Chancery, though in form final, which is in its nature interlocutory merely, cannot be pleaded in bar of another action. *McLane v. Spence, Adm'r*, 172
9. A plea by an administrator that the estate has been declared insolvent, is bad, unless it discloses, that the report of insolvency was made by him, and that he still continues the representative of the estate. *Cameron, Ex'r, v. Clarke, Smith & Co.* 259
10. Where in an action by the indorsee against the indorser, the declaration alleges that after the note became due and payable according to its tenor, to wit, on, &c. the note was duly presented for payment ; though the time stated under the *videlicet* was a day previous to the maturity of the note, yet the generality of the declaration will control it, and be held sufficient. *Smith v. Robinson*, 270
11. In an action of debt on the cautionary bond given on suing out an attachment, the declaration must show the process was wrongfully or vexatiously sued out by the plaintiff in attachment, even when it issues upon the affidavit of an agent : and the declaration is bad if it asserts the attachment was wrongfully and vexatiously sued out by the obligors in the bond. *McCulloch, et al. v. Walton*, 492
12. Under a declaration which describes a note for the payment of a sum of money at an appointed day, it is not allowable to give in evidence a note which conforms to the description in the declaration, and contains the additional stipulation to pay "interest from the date." *Sawyer's Adm'r v. Patterson*, 524
13. *Semble*: A plea in abatement is bad on demurrer for duplicity. *Caldwell v. Branch Bank at Mobile*, 549

PLEADING—CONTINUED.

14. It is not necessary in declaring on a writing obligatory, to alledge that it was delivered to the obligee—delivery will be presumed from possession by him. *Spence, et al. v. Rutledge, Adm'r*, 590
15. Where in an action on a promissory note given for the purchase money of land, the plaintiff consents to receive pleas informally and briefly stated upon the papers, thus: "Failure of consideration. Fraudulent representation, by which the defendant was induced to make the purchase of plaintiff's testator," and merely denies their truth by replications on which issues are submitted to a jury; it will be intended that the pleas severally alledged such facts as established in point of law a failure of the consideration for which the note was given; and a fraudulent representation by the testator in respect to the consideration which induced the defendant to make the contract; and that the defendant was in a condition to avail himself of such defences. Evidence on the part of the defendant, which does not support these issues should therefore be rejected. *Knight, v. Turner's Ex'r*, 636
16. Counts in debt for the statute penalties for extortion may be joined with one for money had and received, where the entire recovery goes to the party aggrieved. *Spence v. Thompson*, 746
17. A plea that a writ was not served as returned by the sheriff, is bad.—*Brown v. Turner*, 752
18. Where a declaration contained two counts in trover, to which a third was added alledging a conversion of the chattel by selling or otherwise disposing of it, whereby the plaintiff is greatly aggrieved, injured and prejudiced in his reversionary estate and interest, to wit, to his damage fifteen hundred dollars; and concludes that the defendants, though often requested, have hitherto failed, neglected and refused, and doth still fail, neglect and refuse to pay the said sum of money, or any part thereof, to the plaintiff's damage, &c.: *Held*, that the plaintiff could not recover on this count, as setting forth a cause of action *ex contractu*; but like those which preceded it, it must be considered as in form *ex delicto*. *Nations v. Hawkins' Adm'rs*, 859
19. A plea by the defendant that the plaintiff was declared a bankrupt *pendente lite* need not alledge any thing in respect to the jurisdiction of the court in which the proceedings in bankruptcy were had; for it will be intended that these were in the proper tribunal. *Lacy, Terrell & Co. v. Rockett*, 1002
20. *Quere*. Is it not a good plea that some of the plaintiffs, all of whom were a partnership, were declared bankrupts *pendente lite*? *Ib.* 1002
21. B., by a contract in writing, transferred to I. a notemade by L. for the payment of \$2,000, which was past due, stipulating that it should be *first paid* from the proceeds of certain lands, &c., which L. bought from

PLEADING—CONTINUED.

B., and for the sale of which B. had filed a bill in chancery, &c.: *Further*, that if the lands, &c., did not bring the amount of the note when sold under the decree in chancery, then B. would pay the deficiency: *Held*, that in declaring upon the contract, it is sufficient to alledge that the decree had been rendered in the chancery suit, that the lands, &c. had been sold under its authority, that the amount produced by the sale was insufficient to pay the note, and what the deficiency was; without alledging that B., who was the complainant in chancery, had notice of these facts: *Further*, that the contract being a writing, separate from and independent of the note, could not be treated as an indorsement thereof. *Brown v. Isbell*, 1009

See Action and Action Qui Tam, 6.

See Bankrupt, &c. 3.

See Error, Writ of, 19.

See Evidence, 47.

See Executors and Administrators, 8.

See Practice at Law, 17.

PRACTICE IN CHANCERY.

1. It is error in the chancellor to direct the master to take an account, and after ascertaining the amount due the complainant, to apportion it among the several defendants, and if they do not pay on request, to issue execution. *McCartney, et al. v. Calhoun, et al.* 110
2. Where one is administrator of two estates, a claim may be asserted in the same bill, against both, if all the defendants are equally interested in the question. It is not necessary their interest should be joint. It is sufficient if it is common to, or concerns them all. *Ib.* 110
3. Where a bill charges that the defendant, or a person under whom he claims, failed to perform some legal act, indispensable to the validity of his title, in a manner conformable to law, an affirmation by the defendant in his answer, that the act was regularly performed, without stating with particularity the mode of performance, is not such a denial as requires the testimony of two witnesses, or one witness and strong circumstances to overbalance it. *Lyon, et al. v. Hunt, et al.* 295
4. Upon a bill charging a contract for a purchase of land, alledging the payment of the purchase money, and praying that the title to the land may be vested in the vendee or his heirs, the court is not authorized to render a decree in favor of the complainants; although it is alledged that the defendant fraudulently refuses to comply with his contract; and in addition to the special prayer, there is a prayer for general relief. *Strange, et al. v. Watson,* 325
5. If the complainant mistakes the relief to which he is entitled, in his special prayer, he may have the appropriate redress, under the prayer of gene-

PRACTICE IN CHANCERY—CONTINUED.

- ral relief; provided, that relief is such as is agreeable to the case made by the bill: but the court will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another. *Strange, et al. v. Watson*, 325
6. Where the complainant doubts his title to the relief he wishes to pray, the bill should be framed with a double aspect, so, if the court should decide against him in one view of the case, it may afford assistance in the other. *Ib.* 325
7. When the object of a bill is to reach equitable assets of a corporation in satisfaction of a judgment at law, and the assets are supposed to consist of the unpaid subscriptions to the capital stock, as well as the proceeds which may be produced on setting aside an alledged fraudulent deed executed by the corporation, the bill is not multifarious because individual stockholders are joined as defendants with the trustees and purchasers under the alledged fraudulent deed. *Allen, et al. v. Montgomery R. R. Co. et al.* 437
8. Where relief is sought in the case of a lost instrument as a guard upon the preliminary exercise of jurisdiction, an affidavit should be made that the instrument is lost, and not in the possession or power of the complainant; but to sustain the suit, if the loss is not admitted by the answer of the defendant, it is necessary that it be established at the hearing of the cause by competent and satisfactory proof; and the affidavit itself is not admissible. *Hooe v. Harrison*, 499
9. The answer of one partner, on behalf of the firm, is sufficient, where the members of the firm are not charged with personal knowledge of the facts. *Reynolds v. Dothard, et al.* 531
10. A defendant in chancery has the right at any time before the final hearing, to have a decree *pro confesso* set aside upon filing a full and complete answer. This right will not be lost, because the defendant had previously made an ineffectual effort to set aside the decree *pro confesso*, upon an insufficient answer. *Pond, et al. v. Lockwood, et al.* 567
11. The answer of a defendant denying the allegations of the bill, does not make it necessary to prove them by two witnesses. Proof by one is sufficient. *Moyler v. Moyler*, 621
12. When the residence of a non-resident is known, a copy of the order posted up at the court house door, must be enclosed to him, otherwise no decree *pro confesso* can be rendered. *Butler v. Butler*, 668
13. One in contempt, cannot raise the objection that a sufficient time did not elapse between the report of the master and its confirmation. *Ib.* 668
14. In the case of a non-resident, a decree *pro confesso* is an admission of the truth of the allegations of the bill. *Ib.* 668
15. The failure to execute the bond, which the law requires, when a decree is rendered against a non-resident, is error. *Ib.* 668

PRACTICE IN CHANCERY—CONTINUED.

16. A bill may be exhibited in the county where a defendant resides, though that is not the county in which the judgment sought to be enjoined was rendered. *Ib.* 668
17. When a cause is transferred from the orphans' to the chancery court, the latter will take it in the plight and condition it is then in, and proceed with it like other chancery causes, applying the law regulating such estates in the orphans' court. *Taliaferro, adm'r, v. Brown,* 703
18. A court of chancery will direct an issue to be tried at law only in those cases where doubt is produced in the mind of the chancellor, either by the nature of the proof itself, or by reason of conflicting evidence. *Atwood v. Smith,* 894
19. *Semble*: A bill may be dismissed at the hearing for *want of equity*, although no demurrer is interposed, and the answer does not question its equity. *Freeman v. McBroom, et al.* 943
20. M. a resident of Madison county, recovered a judgment against F. in the county court of Jackson county, to enjoin which F. filed his bill in the chancery court of Madison—making M. and four other persons defendants; two of these latter reside without this State, and the other two in Franklin and Talladega counties; all the defendants but the one who resided in Talladega answered the bill, without objecting that it was filed in an improper county; the defendant living in Talladega was in default in not answering within due time, and a rule was pending against him to show cause why he should not be attached: *Held*, that in this predicament of the cause, the bill should not be dismissed on the ground that it should have been filed in the county where the judgment was rendered; that an objection to the locality of the suit was in the nature of a plea in abatement, and was waived by the answers, if it could have availed had it been previously made; and the defendant who was in contempt could not submit such a motion. *Ib.* 943
21. Where the report of a sale by a register in chancery is confirmed, the confirmation relates back to the time of the sale, so that an action instituted between the two periods, founded upon a contract by the complainant, to make good what the sale failed to produce short of a certain sum, is not prematurely brought. *Brown v. Isbell,* 1010
22. E., as the indorsee of C., of a note payable to the latter for the use of another person, recovered a judgment against F. in Talladega, the *cestui que trust* filed a bill in another chancery district, asserting his right to the money, praying that a collection of the judgment be enjoined, and that the defendant therein be a trustee for the complainant of the amount due and to become due thereon: *Held*, that it was competent for the complainant to have instituted his suit in any district in which T. resided, and that an objection by E. and C. alone, that the bill should have been filed in Talladega is not available. *Eldridge v. Turner,* 1049

PRACTICE IN CHANCERY—CONTINUED.

23. Where the testimony supports the allegations of a bill *substantially*, this is all that is required; and relief will not be denied, because there is a discrepancy between the case as alledged and that proved in some unimportant particular. *Ib.* 1050
24. Where one of the objects of a bill is to enjoin a judgment recovered by the indorsee of a note, the indorsee is a necessary party, and if he die pending the suit, it should be revived against his personal representative. —*Ib.* 1050
25. *Quere?* Where a bill alledged that the mortgagor of a boat was to have it insured and assign the policy to the mortgagees, which was not done, and the mortgagor admits by his answer that he had not assigned the policy, but alledges he had insured in a solvent office for the benefit of all concerned, with which the mortgagees were well satisfied; as the defendant admits that he did not comply with the contract in respect to the insurance, is not the affirmation of what he did and the complainant's assent to it, irresponsible, and should it not be proved by the respondent. *Walker, et al. v. Miller & Co.* 1067
26. Where a deed assigning all a debtor's property to trustees for the benefit of creditors, contemplates the exclusive management of the interests conveyed, by the trustees in the execution of their trust; it is competent for the trustees to assert their rights under the deed without making the creditors parties to a suit in chancery; and being competent to sue if they take possession of property which belongs to others, or on which others have liens they may be sued without bringing the *cestui's que trust* into court. —*Ib.* 1067
- See Deeds and Bonds, 5, 6.
- See Error, Writ of, 20, 22.
- See Evidence, 60.

PRACTICE AT LAW.

1. Where a point or question arising in any criminal case is referred to the supreme court as novel and difficult, it should be brought before that court at the first term after the trial below: and if the record is not then brought up, the judgment or sentence should be executed. Perhaps after the lapse of a term it may be allowable to revise on writ of error the point referred, if regularly presented upon the record. *The State v. Ivey,* 47
2. A surety to an attachment bond, who is a necessary witness for the party, may be made competent, by the execution of a new bond with other sufficient surety, and it is the duty of the court to permit such substitution to be made. *Drinkwater v. Holliday,* 134
3. When an administrator is cited by a husband in right of his wife, omitting her name, and a settlement is submitted to, it is a waiver of all irregularities in the mode of citation. *Petty v. Wafford,* 143

PRACTICE AT LAW—CONTINUED.

4. Where the jury render a verdict for more damages than the legal liability on which the plaintiff founds a right to recover, the judgment will not be reversed on error, but a defendant should move for the new trial in the primary court. *Riggs, et al. v. Bank of the State,* 183
5. Where in an action by the indorsee against the indorser, the declaration alleges that after the note became due and payable according to its tenor, to wit, on, &c., the note was duly presented for payment : though the time stated under the *videlicet* was a day previous to the maturity of the note, yet the generality of the declaration will control it, and be held sufficient. *Smith v. Robinson,* 270
6. It is allowable for a court to set aside a non-suit at the term at which it is rendered, though no notice was given to the defendant that a motion would be made for that purpose. *Ib.* 270
7. In an action against an indorser, it is competent to render a judgment final by default, without the intervention of a jury. *Ib.* 270
8. Where a judgment in an action on a demand ascertained by writing is for more than principal and interest, it will be corrected in the primary court on motion, or by the supreme court at the cost of the plaintiff in error. *Ib.* 271
9. The receiving a plea in abatement, after the time for filing such a plea has passed, is matter of discretion in the court below, and cannot be reviewed in this court. *Massey v. Steele's Adm'r,* 340
10. When the parties interested in the distribution of money in the sheriff's hands appear and state an agreed case, the court may determine the right, although the sheriff has not made the application to the court, nor is a party to the case. *Turner v. Lawrence,* 427
11. A party has no right to ask a new, and substantive charge to the jury, on their returning into court for an explanation of the charge previously given, or for the purpose of having it again repeated. *Prosser v. Henderson,* 484
12. It is sufficient if the memorandum of the style of the cause, made by the clerk, indicate with reasonable certainty to what suit it relates. The description of it by the firm name is sufficient, and the judgment in favor of the plaintiffs against the defendants is sufficient, as the pleadings show who they are. *Collins & Co. v. Hyslop & Son,* 508
13. Where the defendant objects *severally*, to the admissibility of the note and its indorsement, on which the action is founded, if either the note or indorsement are inadmissible, the objection should not be overruled, because no cause is particularized; but where a general objection is made to written evidence, and the party objecting refuses to specify, or states one that is insufficient, then perhaps an appellate tribunal would not reverse the judgment, though a valid objection might have been stated in the court below. *Sawyer's adm'r v. Patterson,* 524

PRACTICE AT LAW—CONTINUED.

14. Where in rendering a judgment by *nil dicit* or default, on a demand ascertained by writing, too much interest is calcutated, the error will be corrected on motion, or in the appellate court at the cost of the plaintiff in error. *Spence, et al. v. Rutledge, adm'r,* 591
15. The power of supplying a new record where the original has been lost is one which pertains to courts of general jurisdiction, independent of legislation, and if the notice of the motion for leave to substitute it, is explicit in describing a judgment and papers alledged to be lost, it is sufficient, though it does not conform to a statute which provides for such a proceeding. *Doswell, et al. v. Stewart,* 629
16. When one is summoned as a garnishee of joint judgment debtors, the service of the garnishment operates as the attachment of debts due to the defendants severally, and consequently there is no error in propounding an issue that the garnishee is indebted to one of the joint debtors. *Locket v. Child,* 640
17. Upon a motion to enter satisfaction of a judgment, affidavits of the parties are admissible; and an affidavit of payment is *prima facie* sufficient, unless contradicted by the other party. *Faulkner v. Chandler,* 725
18. Objections that the costs are too large, must be made in the court below, and cannot be raised for the first time in this court. *Ib.* 725
19. Where a deposition is supposed to be irregularly taken, the party may re-take under an order of court, and that even when the cause is called for trial, and the other party has announced himself ready for trial, but is unwilling to waive exceptions to the deposition. *Milton v. Rowland,* 732
20. A judgment for costs, cannot be rendered in favor of any one, but a party to the suit. One cannot be rendered on motion, in favor of the officers of court. *Patterson, et als. v. The Officers, &c.* 740
21. It is no valid objection to a decree dismissing a bill having no equity, that the motion was made by a defendant in contempt for want of an answer. *Smith v. Robinson,* 840
22. Before the passage of the act of 1846, the filing of a plea *puis darrein continuance*, tacitly superseded all other pleas previously filed, and the plaintiff should not have demurred, because the defendant was not entitled to a trial on the latter; but should have presented the question to the court on suggestion or motion, and if the decision was adverse to him, he should have excepted, and thus raised for a revising tribunal the effect of a plea *puis darrein continuance* upon the previous pleadings in the cause. *Lacy, Terrell & Co. v. Rockett,* 1002
23. Where the plaintiff consents to receive an incomplete plea, or a plea in short according to the usual practice, which would be an available defence if the sketch or outline were put in form, it cannot be held bad on demurrer. *Ib.* 1002
24. Where the plaintiff declares upon a written contract which assigns a bill

PRACTICE AT LAW—CONTINUED.

single, sets it out *in extenso* and stipulates to pay it, if the means of payment shall not be provided by another source, he will not be required to produce it at the trial—its production not being necessary to entitle him to recover, and it not appearing to have been in his possession. *Brown v. Isbell*, 1009

See Amendment, 4.

See Attachment, 5.

See Bankruptcy, &c. 3.

See Costs, and Surety for, 10, 13.

See Demurrer, 1.

See Deposition, 4, 9.

See Error, Writ of, 5, 15.

See Estates of Deceased Persons, 8.

See Evidence, 7, 8, 56.

See Garnishment and Garnishee, 10, 15.

See Intendment and Legal Presumption, 4.

See Principal and Surety, 12, 13, 14.

PRINCIPAL AND AGENT.

1. A ratification of the act of one professing to act as agent, with knowledge of the facts, has the same effect as if the agent had been fully authorized to act, especially in a case where the person to be affected, was not privy to the act of the supposed agent. *Reynolds v. Dothard, et al.* 531
2. Where several persons are deputed to represent another in some business transaction, such as the sale of property, &c., it seems that all of them should join in executing the authority; but the interest of the principal as gathered from the words in which the power is conferred, may control the rule of interpretation. In respect, however, to public agencies, an authority executed by a majority will be held obligatory and a good execution. *Caldwell v. Harrison*, 755
3. An authority to commissioners to make the plan of a bridge across a stream at a place where a road passes, to contract for its erection, and to examine and report whether it is completed according to the plan, is *quasi* a public agency, and if the majority of them make the report contemplated, their action is quite as obligatory upon those concerned, as if it had received the sanction of all the commissioners. *Ib.* 755
4. As a general rule where a written contract is entered into by an agent with a third person, to bind the principal and make it his act, it must purport on its face to be his contract; but it cannot be assumed as a *legal conclusion* from the fact, that the principal has no middle name—merely subscribing himself *David Walker*, that a promissory note subscribed “Da-

PRINCIPAL AND AGENT— CONTINUED.

- vid S. Walker," by his son and agent who uses the initial S., was accepted by the payees as the personal undertaking of the agent, and that the credit was given to him; but the *prima facie* intendment in favor of the principal may be repelled by proof. *Clealand v. Walker*, 1058
5. The ratification of a contract when fairly made, will bind the principal in respect to the agent and third persons in the same manner as if the agent had acted under a previous authority. But this rule has its exceptions; thus if one was to say that he authorised another person to purchase property and furnished the means of paying for it, this would not bind the principal to pay, if the agent had converted the money; but if the money was returned by the agent, or the purchase made on a credit and the money furnished by the principal, he would be bound if the agent did not apply it. *Ib.* 1058
6. Where the name of the principal is not disclosed by the agent when the contract is made, it is said that the creditor may charge either of them at his election; and although he may have debited the agent, supposing him to be the principal, he may recover the amount of the latter, if the account between the principal and agent is not altered to the prejudice of the former. But if the vendor, with a knowledge of who the vendor is, makes the agent his debtor, he is bound by the election, and can't look to the principal for payment. *Ib.* 1058
See Evidence, 61.

PRINCIPAL AND SURETY.

1. A usurious contract with the principal debtor to give day of payment, will not discharge the surety, although the delay is actually given in pursuance of the contract. *Gilder v. Jeter*, 256
2. It is no defence at law, either partial or total, that the creditor at the instance of the surety, agreed to file the note in the clerk's office for a dividend, the principal being dead and insolvent, and that for want of the necessary affidavit it was rejected by the orphans' court. If the party has any redress, it must be by action to recover damages for the misfeasance. Whether a court of equity would afford redress—*quere?* *Pearson, et al. v. Gayle*, 278
3. Where one who is the surety of another, receives from him as an indemnity a promissory note payable at a particular time, he may sue upon it, though he has not been compelled to pay the surety debt, if his liability to pay continues. *Quere*—Has not the debtor in such a case an equity to insist, that the money so recovered shall be applied in discharge of the principal debt. *Russell v. La Roque & Hatch*, 352
4. Where a surety about to be sued, and before the statute of limitations has created a bar, hands to the creditor for suit, a note which had been executed to him by the principal debtor as an indemnity, the effect is such an

PRINCIPAL AND SURETY—CONTINUED.

- admission of indebtedness on his part, as will postpone the operation of the statute six years longer as to him. *Ib.* 352
5. Sureties to a constable's bond, may litigate the liability of their principal, as a judgment may be rendered against him, on a notice to them.—*Robertson v. Coker*, 467
6. A constable is not a competent witness for his sureties, though released by them. *Ib.* 467
7. The sureties of a constable, who knowingly permit him to act under an insufficient bond, will be held responsible upon it. *Ib.* 467
8. A gratuitous agreement by the holder of a bill with the acceptor, made on the last day of grace, to look to him alone for the payment, and not to present the bill, or notify the drawer, does not relieve the drawer if the protest is made and notice given. *De Witt v. Bigelow & Co.* 480
9. A gratuitous indulgence given by the plaintiff to the principal after the recovery of a judgment against him will not discharge the surety. *Sawyer's Adm'r v. Patterson*, 524
10. Under the statute which allows one surety when sued by the common creditor to have judgment against his co-surety, it can be given only for one-half the sum of the creditor's judgment, notwithstanding the surety not sued may have received a full indemnity from the principal debtor.—*Broughton v. Robinson*, 922
11. The judgment in favor of one surety against the other is not dependent on the payment of the money, but on the judgment being obtained against him by the common creditor, and is allowed as a means to compel the co-surety to contribute to the payment of that judgment, and should be entered without condition. *Ib.* 922
12. The proof prescribed by the statute to be made at the trial, refers to the trial of the suit between the creditor and the surety sued by him, but this proof at that trial is unnecessary, when issues are formed between the sureties on the notice of motion of the one sued by the creditor. *Ib.* 922
13. When such issues are tendered by the defendant in the motion, it dispenses with the proof required to be made in the creditor's suit, and the judgment entry between the sureties need only show the matters necessary to sustain the jurisdiction of the court, as in other cases of summary proceedings. *Ib.* 922
14. In proceedings under this statute, the judgment entry should show—1. The pendency of a suit by the common creditor against the surety making the motion—2. That he has notified his co-surety in writing of the pendency of the suit—3. That judgment has been rendered, and its sum in the creditor's suit—4. In judgments by default—that proof was made at the trial of the creditor's suit, that notice in writing was given to the co-surety, and also that the parties were sureties—and 5. When the judg-

PRINCIPAL AND SURETY—CONTINUED.

- ment is for more than an aliquot portion of the debt—that the other co-sureties are insolvent to the number necessary to support the particular sum for which judgment is given. *Ib.* 922
15. A statement in the judgment entry that the common creditors' judgment was obtained on a verdict at a day which appears to be after trial, in which notice of its pendency was given to the defendant, will warrant the inference that it was pending at the time of the notice, that appearing to be some thirty days anterior to the judgment. *Ib.* 923
16. Although the common creditors' suit is against two of the sureties, one of whom in point of fact is insolvent, the solvent creditor is notwithstanding entitled to his motion against a co-surety not sued. *Ib.* 923
17. Under the statute, when notice is given by the surety sued to another not sued, the judgment of the common creditor, in the absence of fraud and collusion, is conclusive of the liability of the surety, and ascertains the amount of contribution between the sureties. *Ib.* 923
18. Although the judgment itself under such circumstances is conclusive, it is no error if the plaintiff introduces other regular evidence. Record evidence of the liability of the principal debtor, by the production of the creditors' judgment fixing his liability, is admissible, though unnecessary. —*Ib.* 923
- See Husband and Wife, 3.
- See Limitations and Non-claim, Statutes of, 6.

PROMISE TO MARRY, AND BREACH OF.

See Pleading, 1, 2.

RECOGNIZANCE.

1. Under our statute the deputy sheriff, when he arrests a party on a *capias*, for a misdemeanor, is authorized to take his recognizance, and such recognizance need not be certified by the officer. *Shreeve & Knapp v. The State*, 676
2. The misdescription, or the want of a proper description of the offence in the recognizance, will not avoid a judgment on it, as it is forfeited by the non-appearance of the party. *Ib.* 676
3. After judgment, it is too late to object that there is a variance in the recognizance entered into, and that set out in the judgment *nisi* and *sci. fa.* *Ib.* 676
- See Vendor and Vendee, 3.

RETAILERS AND RETAILING.

1. The term premises in the statute authorizing merchants and shopkeepers to retail spirituous liquors by the quart, so that the same be not drank

RETAILERS AND RETAILING—CONTINUED.

- with, &c. on the premises where they reside or have their stores, means something over which the individual has control; and therefore a conviction is proper when the liquor furnished is drank from glasses of the shop-keeper on a bench used by him in a mill yard some fifteen or twenty steps from the house where the liquor was sold. *Swan v. The State*, 594
2. To legalize the retailing of spirituous liquors, it is necessary that a license should first be obtained for that purpose from the county court—a license to keep a tavern does not confer that right. *Page v. The State*, 849
3. The act incorporating the town of Eutaw does not authorize “*bona fide* licensed tavern keepers” resident in that town to retail spirituous liquors within its limits; unless they first obtain from the county court a license to retail. *Ib.* 849

RIGHT OF PROPERTY, TRIAL OF.

1. A judgment was recovered, and an execution issued thereon levied on property to which a third person interposed a claim; pending the trial of the right of property, the judgment was reversed, notwithstanding which the trial proceeded, and the property was condemned: Held, that the judgment of condemnation beyond the amount of cost in the proceeding in which it was rendered, could not be enforced by execution—that it being consequential and dependent, the reversal of the judgment in the principal case, took from it a necessary and indispensable foundation. *Clements v. Elliott*, 360
2. When a levy is made in a county different from that from which the execution issued, and a trial of the right of property is demanded, the copy of the execution returned by the sheriff to the county of the trial, has the same effect as if it was an original execution, without any certificate that it is a copy. *Henderson v. Bank at Montgomery*, 855
3. The claimant is estopped by his bond, from denying that a levy was made. *Ib.* 856
4. The grantor in a deed of trust containing no reservation or condition for the benefit of the grantor, is not a mortgagor within the terms of the act excluding mortgagors, or defendants in execution from being witnesses in claim suits—the individual not being the defendant in execution, and the property being levied on as that of a third person. *Frow & Ferguson v. Downman*, 880
5. In a claim suit, the claimant cannot show an outstanding title in a stranger for the purpose of defeating the execution. *Ib.* 880
6. When a trustee in a deed of trust, refuses to make the affidavit, and take the steps necessary to a trial of the right of property, the *cestui que trust* may resort to a court of chancery to have the trust enforced. *Robinson & Caldwell v. Mauldin, &c.* 978

See Mortgagor and Mortgagee, 1.

See Witness, 2.

ROADS, BRIDGES AND FERRIES.

1. *Quere?* Whether any individual can make himself a party against those asking the action of the commissioners of roads and revenue, in the matter of a public road. Also—whether even a *certiorari* can be sued out to set aside, or quash an order of this public nature, except in the name of the State *ex relatione*. *Moore v. Hancock*, 245
- 2 No individual has the right to intervene in the court of commissioners of roads and revenue, and put questions on the record by bills of exception in the matter of a public road. *Ib.* 245
3. An order to change a public road is regular, if the order shows what change is directed to be made—if a jury consisting of the proper number of persons is appointed to view the proposed change, and their return conforms to the statute—and after this a second jury is appointed to lay off and mark the proposed alteration. *Ib.* 245
4. The service of an injunction at the suit of a stranger, asserting a title to a ferry in the possession of a lessee, restraining him from interfering in the use of the ferry, is not such a disturbance as amounts to an eviction, and therefore will not prevent the lessor from recovering rent when the bill is dismissed. *Ricketts, et al. v. Garrett*, 806
See Contracts and Agreements, 4.
See Principal and Agent, 3.

SALES.

1. Where a debtor in the first instance gives a mortgage on slaves, to secure his creditor, and the creditor afterwards takes from him another mortgage on the same and other property, extending the law day, and securing other creditors, the acceptance of the last mortgage creates an implied contract not to proceed on the first, and therefore the possession held by the creditor, of slaves purchased at a sale under the first mortgage is not adverse, so as to render a sale by the trustee under the second mortgage void on account of an adverse possession. The title of a creditor acquired by his purchase, is subordinate to the last mortgage. *Billingsley v. Harrell*, 775

SCIRE FACIAS.

1. In proceeding against a garnishee after the rendition of a judgment *nisi*, two returns of *non est* to succeeding writs of *sci. fa.* will sustain a final judgment against him. *Armstrong v. Dargan & Mays*, 506
See Executors and Administrators, 8.
See Heirs, Devisees and Distributees, 1.
See Pleading, 3.

SEAL, AND INSTRUMENT UNDER.

1. Contract between the parties by which the *principal duty was to be per-*

SEAL, AND INSTRUMENT UNDER—CONTINUED.

formed by *A. G.* (the defendant) in favor of *J. W. W.* (the plaintiff,) concludes and is subscribed as follows: "In testimony of which, we have hereunto annexed our respective signatures, this 30th day of April, A. D. 1841. *J. W. W.* [*L. s.*] *A. G.*" *Held*: That this was not a sealed instrument previous to the act of 1839, and that, that statute had not made it such; that to constitute a writing under seal, it should import upon its face that the parties thus intended to execute it. Such an indication might be made by the usual conclusion, "witness our hands and seals," &c. and perhaps by a scrawl set opposite the names of all who subscribed the instrument, with the word *seal* or the letters *L. S.* written therein. *Waddel v. Glassel*, 568

SET-OFF.

1. A debt due to two carrying on a smith shop jointly, and collected by an overseer, may be set-off by the administrators of the survivor to a suit against them in their representative capacity, by the overseer on a note made by the survivor; but the presumption arises that the debt was settled when the survivor afterwards gives his note to the overseer, and the judgment will not be reversed when the claim is rejected as a set-off, but is admitted to show fraud in the settlement, and the verdict negatives the fraud. *Hale, et al. v. Brown*, 87
2. Notwithstanding a set-off may be asserted against the actual party in interest, yet it is necessary to show against that party a cause of action for what the defendant could sue him in his own name. *Bowen v. Snell*, 379
3. To entitle the defendant to set-off a note payable to a third person, he must prove its genuineness, and that it was indorsed to him previous to the commencement of the suit; the mere appearance of the payee's name written on the paper, does not warrant the inference that the defendant is its legal proprietor. *Crayton v. Clark*, 787
4. Where the payee of a note assigns it by delivery merely, so as to make it necessary to sue in the name of the party beneficially interested, the maker cannot set-off a demand acquired against the payee, after he had notice of the assignment. *Ib.* 787
5. It is not necessary that the assignee of a note by indorsement, or delivery, should give notice by himself or an agent, that he is the holder of the paper, to exclude sets-off acquired subsequent to the assignment; but it is sufficient if the maker is informed of the transfer by one who has knowledge of the fact, and speaks understandingly. *Ib.* 788
6. *R.*, upon the payment to *B.* of the sum of \$550, was entitled to receive \$800, being part of the amount of a note which *B.* as the payee, held against *L.*; *B.*'s agent received the \$550 of *I.*, and assigned him the note by a separate writing, stipulating that *B.* should pay it to *I.*, if the latter failed to collect it by the sale of certain property of *L.*—*I.* at the same

SET-OFF—CONTINUED.

time had other demands against R., which by the advance of money made for him, he professed to collect from the proceeds of the note: *Held*, if I. was merely substituted for R. in accepting the assignment, or received it in trust for R's benefit, either in whole or in part, and it can be inferred he became the assignee under an agreement that such sets off, as B. was the proprietor of, beyond the \$800 against R. should be allowed, then these sets off would be admissible in an action by I. against B. on the assignment. But in the absence of an agreement upon this point, either express or implied, the indebtedness by R. to B. is not admissible as a set off to diminish the recovery of I. *Brown v. Isbell*, 1010

Sée Evidence, 21.

SHERIFF AND HIS SURETIES.

1. So long as the return of a sheriff is permitted to remain, it must be taken to be true for all purposes, both as it respects the sheriff, and parties claiming rights under it. Therefore, in an action against the sheriff for making an insufficient levy upon an attachment, he cannot show, that by the mistake of a deputy, a return was made upon the attachment, of a slave not levied on, and that in point of fact, a sufficient levy had been made. *Clarke v. Gary*, 98
2. If a deputy empowers a stranger to make a levy, and afterwards adopts it by his return, it becomes his own act. *Ib.* 98
3. Where a plea to a motion against the sheriff goes to the default, and it is not stated by whom pleaded, it will be considered as the plea of the sheriff. *Glover, &c. v. Chandler, et al.* 161
4. When a motion is made against a sheriff and his sureties at the instance of the clerk of the supreme court for failing to return an execution, it is not essential the pleas asserting the return of the execution and payment should be verified by oath. *Ib.* 161
5. A plea that the money was paid before notice issued is good, without averring by whom or to whom payment was made. *Ib.* 162
6. No motion in such a case will be sustained after payment made and accepted, although it is made after the default. *Ib.* 162
7. When the parties interested in the distribution of money in the sheriff's hands appear and state an agreed case, the court may determine the right, although the sheriff has not made the application to the court, nor is a party to the case. *Turner v. Lawrence*, 426
8. It is a sufficient excuse for an officer in not returning an execution, that the plaintiff authorized him to hold it up. *Robertson v. Coker*, 466
9. A notice to a sheriff, setting forth a demand, need not state the day on which the demand was made. *Spence, et al. v. Rutledge, adm'r*, 557
10. It is not necessary to alledge in a notice, that the plaintiff resided in the

SHERIFF AND HIS SURETIES—CONTINUED.

- county where the judgment was rendered. If he resides in a different county, it is a matter of defence to the sheriff, who by making that proof, will cast on the plaintiff the necessity of proving a personal demand, or by an order in writing. *Ib.* 557
11. When the notice is to the sheriff, the record must show that those against whom the judgment was rendered as his sureties, were proved to be such; and if not done in the court below, the proof cannot be made in this court. *Ib.* 558
12. A demand of the sheriff by the attorney of record, is in law a demand by the plaintiff. *Ib.* 558
13. It is not essential to the efficacy of a *supersedeas*, that it should be executed by a sheriff or other officer; but a delivery of the *supersedeas* by the defendant in execution or other person, to the officer who has in his hands the process to be superseded, is effectual for all legal purposes. *Welch v. Jones,* 660
14. The statute forbidding an action to be brought against the sureties of a sheriff, or other public officer, after the lapse of six years, for a misfeasance, or malfeasance committed by him (Clay's Dig. 329, § 90,) commences to run, when the responsibility of the surety is conclusively ascertained. *Governor v. Stonum, adm'r,* 679
15. In the case of the collection of money by the sheriff, by execution, the statute commences running in favor of the surety, when the sheriff returns the execution satisfied. *Ib.* 679
16. In a summary proceeding by motion at the suit of a sheriff against his deputy, under the act of 1828, for the failure to pay over money collected by the deputy on an execution, in consequence of which judgment had been rendered against his principal it was shown that between the receipt and return of the execution, the deputy paid the sheriff \$19,615 87, but upon no particular account, and the receipt given by the latter did not indicate how it should be appropriated. The sheriff's clerk could not tell whether the money received on the execution in question had been paid to the sheriff; but it was shown that from ten to twenty-five thousand dollars of the money collected by the deputy during the time he acted for his principal was unaccounted for: *Held,* that upon this evidence the court was warranted in rendering judgment for the sheriff. *Baldwin, et al. v. Gully,* 716
17. Several plaintiffs having distinct interests, cannot unite in a motion against the sheriff. *Patterson, et als. v. The Officers, &c.* 740
18. Where a *fiery facias* issued on a joint judgment against the principal and his security, is returned unsatisfied, it is no answer to a suggestion by the plaintiff, that the sheriff could with due diligence have made the money thereon, that the surety paid the execution in part, upon an agreement with the plaintiff that the latter should proceed against the sheriff and his

SHRIFF AND HIS SURETIES— CONTINUED.

sureties for the neglect of the latter to make the money of the principal, before the surety should be looked to for the payment of the residue. But it seems the recovery upon the suggestion should not exceed the balance of the *fi. fa.* unpaid, with damages and costs. *Gary, et al. v. The Bank of the State,* 772

19. It seems that a judgment against a sheriff and his sureties for failing to pay over money collected, will not carry damages at the rate of five per cent. a month until the sum is collected; but whatever the construction of the statute is, a coroner is not liable for the omission to collect the five per cent. per month when neither the execution nor judgment directs it to be done. *Herrin v. Woodward,* 792

20. A return to an execution "stayed by the plaintiff till further orders," does not impart verity when the motion is against a sheriff for a false return, but he is required to sustain it by proof. *Andress, et al. v. Crawford,* 853

21. Where the judgment entry recites the default of the party as sheriff of a named county, and a judgment is also given against others as his sureties, it will be presumed they are sureties on his official bond. *Ib.* 853

See Bailor and Bailee, 1.

See Execution, Writ of, 2, 8.

See Notice, 6.

See Recognizance, 1.

See Summary Proceeding, 1.

SLANDER.

1. Where the words charged in the declaration in an action of slander, indicate, that if the plaintiff did testify falsely in the matter touching which the defendant impugned his veracity, his testimony must have been intentionally and corruptly false upon a point material to the issue, it is not necessary that the declaration should alledge that the slanderous words imputed the crime of perjury, according to the laws of this State. *Williams v. Spears,* 138

SLAVES.

See Criminal Cases, Proceedings in, 1.

See Evidence, 36.

See Indictment, 1.

STATUTES.

1. The act enabling plaintiffs to commence another action within a year after a reversal of a previous judgment, (Clay's Dig. 328, § 86,) applies to a case, where by the action of the inferior court, the cause was discontinued as to two of the defendants, and thus caused a reversal of the judgment.

STATUTES—CONTINUED.

ment as to the other defendant, although not within the letter of the statute. *Givens & Co. v. Robbins, Painter & Co.* 156

See Corporations, 7, 9.

See Estates of Deceased Persons, 6.

See Garnishment and Garnishee, 6.

See Indians and Indian Tribes, 1.

See Land Titles South of Lat. 31, 4.

See Seal, and Instrument Under, 1.

STREETS OF TOWNS AND CITIES, AND POWER OVER THEM.

1. Although the fee of a street may be in an individual, is it not competent for the corporate authorities of the city, to cause to be erected, a wharf, or other convenience for the mooring or anchorage of vessels at the *terminus* of the street on navigable water, and demand wharfage and other kindred charges; and if this may be done by the corporation, may it not confer upon a third person, in consideration of a yearly rent, the privilege of making such erection, &c. *Doe ex dem. Kennedy's Ex'rs v. Jones*, 64

SUMMARY PROCEEDINGS.

1. The act of 1819, which gives a summary remedy against a sheriff and his sureties, for the failure to return an execution, does not extend to an execution issued on a decree of the orphans' court, and made returnable to one of the *return days* which the judge of the county court is required, by the act of 1821 to appoint. *Quere*—If such execution was returnable to a *stated term* of the county court, could the sheriff and his sureties be proceeded against summarily for a failure to return it? *Westmoreland &c. v. Hale*, 122
 2. The notice which the law requires to be given in summary proceedings, is sufficient, if it describe the debt upon which the motion is to be made with reasonable certainty. *Colgin v. The State Bank*, 222
 3. Several plaintiffs having distinct interests, cannot unite in a motion against the sheriff. *Patterson, et als. v. The Officers, &c.* 740
 4. Where a notice is given that a motion will be made for judgment on a particular day of the term, if the motion is not then submitted, the notice will perhaps be discontinued; but if it is afterwards made, and continued at the defendant's instance, the latter cannot object to the irregularity. *Gary, et al. v. The Bank of the State*, 771
- See Bank Directors, &c. 1.
- See Jurisdiction, 2.
- See Justices of the Peace, &c. 1.
- See Sheriff and his Sureties, 16.

SUNDAY.

1. A bill of exchange payable twelve months after date, when the nominal day of payment falls on Sunday, is notwithstanding allowed three days of grace, and is properly protestable on the Wednesday following. *Wooley v. Clements*, 220
2. A contract executed on Sunday, is not validated by a subsequent recognition; but where the terms of a contract only are agreed on, on Sunday, and subsequently executed, it may be enforced. *Butler v. Lee*, 885

SUPERSEDEAS.

1. When a credit indorsed on a note is erased before the assessment of damages by the clerk, on a judgment by default, the party is not entitled to a *supersedeas*. *Burt v. Hughes*, 571
2. It is not essential to the efficacy of a *supersedeas*, that it should be executed by a sheriff or other officer; but a delivery of the *supersedeas* by the defendant in execution or other person, to the officer who has in his hands the process to be superseded, is effectual for all legal purposes. *Welch v. Jones*, 660

SURVEYS AND PATENTS.

See Land Titles South of Lat. 31, 4.

TAXES, TAX COLLECTOR, AND SALES BY.

1. The bill charges with particularity, that L. who is insolvent, claims certain lands as the purchaser at an irregular sale of a tax collector, whose deed he has, that L. was threatening to commit trespasses and waste on the premises, that himself and others, acting avowedly under his authority, are making preparations with a view to their commission, that the complainants have been disturbed in the enjoyment of their property, and are likely to be more seriously interrupted: Further, that the complainants are thus prevented from making the profit from their estate which otherwise they would, and its value in market is lessened. Held, that it was competent for chancery in such a case, to grant an injunction to stay the commission of trespass and waste; that as the deed threw a cloud over complainants' title, that court might remove the cloud, and direct the cancellation of the deed; especially where the deed, in point of form, was *prima facie valid*. *Lyon, et al. v. Hunt, et al.* 295
2. To sustain the title of a purchaser of land under a sale by the collector for the non-payment of taxes, it is necessary for him to show *affirmatively*, that every substantial requisite of the law has been complied with; consequently, he must prove that advertisement of the time and place of sale by the collector, was made for the length of time directed by the statute; that the land proposed to be sold was so particularized in the advertisement as to be susceptible of identification, &c. &c. *Ib.* 295

TREASURER, COUNTY.

1. Where a motion is made by a county treasurer, under the statute, against a clerk for not rendering an account, the treasurer is a competent witness to prove the account was not rendered, as the motion is a county prosecution in which the officer has no interest. *Douglass, et al. v. Terrell*, 583
2. In a motion by a county treasurer against a clerk of the circuit court for not returning on oath an account, &c. it is no defence that the plaintiff is not treasurer *de jure* if he is so *de facto*. *Ib.* 583

TROVER AND CONVERSION.

1. Where there is evidence of a conversion, by selling the property in controversy, proof of a demand and refusal is unnecessary, and the rule is the same, although in the first instance the property came lawfully to the defendant. *Kyle v. Gray*, 233
2. The statute which declares that the action of trover shall survive for and against an executor or administrator, was intended to subject them to that form of action in their representative capacity, where a conversion had taken place in the lifetime of the testator or intestate. *Nations v. Hawkins' adm'rs*, 859
3. To support the action of trover, the plaintiff must at the time of the conversion have had a *property* in the chattel, either *general* or *special*, and the *actual possession* or the *right* to the *immediate possession*; consequently, if one who has a life estate in a personal chattel exchanges it with a third person as his absolute property, he who has the interest in remainder cannot maintain trover for the conversion; but a court of equity may perhaps protect his right to the future enjoyment of the thing. *Ib.* 859

TRUSTEE AND CESTUI QUE TRUST.

1. The assent of one *cestui que trust* will not validate a deed which expressly or by implication requires the assent of others. *Pinkard v. Ingersol, et al.* 9
2. One to whom, in common with others, a deed is made as a trustee of a religious society, is seized to the use of the society, and has not such an interest in the land as would authorize him to withhold the deed from those from whom he had received it. *Stoker, et al. v. Yerby*, 322
3. Where a deed of trust was made by a debtor to a trustee to secure a creditor and sureties, the declaration by one of the sureties that the grantor made the deed to prevent his being compelled to pay a security debt, is not sufficient to enable a sheriff seizing the property, after its sale by the trustee to that surety, and a conveyance by him to another in trust for his creditors, to raise the question that the first deed is fraudulent as to the creditors of the grantor, in the absence of any other proof of fraud. *Gary v. Colgin*, 514
4. Where property is conveyed by deed of trust and sold by the trustee in a different manner than directed by the deed, a stranger to the deed cannot

TRUSTEE AND CESTUI QUE TRUST—CONTINUED.

- dispute the regularity of the sale, although the purchaser is guilty of fraudulent acts in connection with it, and has made no payment of the purchase money. *Ib.* 515
5. When a trustee in a deed of trust, refuses to make the affidavit, and take the steps necessary to a trial of the right of property, the *cestui que trust* may resort to a court of chancery to have the trust enforced. *Robinson & Caldwell v. Mauldin, Montague & Co.* 978
6. Where one person proposes to sell property to another, and as an inducement to purchase, offers to take the vendee's note for the price, payable to the vendor for the use and benefit of an infant son of vendee, and to hold the money for the *cestui que trust*; if the vendee accedes to the offer and gives a note in the form proposed, the contract will be obligatory upon the parties, and the payee will be regarded as a trustee for the son.—*Eldridge, and another, v. Turner, by his next friend, &c.* 1049
7. The indorsement of a note which, upon its face is payable to one person for the use of another, cannot impart to the indorsee a right to receive the money due thereon, for his own benefit; but the indorsement is a breach of trust on the part of the payee, which entitles the *cestui que trust* to assert his right to the proceeds of the note, in a court of equity. *Ib.* 1049
- See Husband and Wife, 4.
- See Practice in Chancery, 25.
- See Vendor and Vendee, 3.

USURY.

1. A contract, by which the use of slaves is allowed as a compensation for the interest of money, is not on its face usurious, but will be so, if intended as a shift, or device, to obtain unlawful interest. *Wright v. McAlexander*, 236
2. Such a contract cannot afterwards be converted into a mortgage by the borrower, so as to require the lender to account for the hire of the slaves, if that exceeds the legal rate of interest. *Ib.* 236

VENDOR AND VENDEE.

1. The possession of a deed by the vendee is *prima facie* evidence that it was delivered to him by his vendor, and the *onus* lies upon those interested to prove the reverse to repel the presumption by proof. *Houston v. Stanton and Stanton*, 413
2. Where the purchaser of lands accepts a deed with the usual covenants of warranty, takes possession and retains it, he cannot resist the payment of the purchase money by defence at law to an action brought for its recovery. *Knight v. Turner's Ex'r*, 637
3. When the title to land is conveyed by the principal to his surety, to indemnify him against liability on a recognizance, with power to sell in case

VENDOR AND VENDEE—CONTINUED.

- of default, and the surety sells and executes a title bond to the purchaser, the contract of sale will not be rescinded, although afterwards the recognizance is released by the Governor. *Smith v. Robinson*, 840
4. Where lands are sold, and the vendor executes a bond to make titles when the purchase money is fully paid, and he is unable to make a good title, the course of the purchaser is, to tender the purchase money, and demand a title, or at least, in a suit to enjoin proceedings for collecting the contract price, to aver the readiness to pay upon a sufficient title being made. *Ib.* 840
- See Assignments, 4, 5.
- See Covenant, 2.
- See Lien, 1.

WARRANTY.

1. When there is a warranty of a personal chattel, the law does not impose on the buyer the duty to return it, if the warranty is untrue, but he is allowed to keep the chattel and sue for the breach of warranty. *Milton v. Rowland*, 732
2. When the purchaser of a slave, warranted sound, subsequently sells it for an advanced price, the expenses and trouble he has been at does not furnish the sole measure of damages for the breach of warranty. The price subsequently obtained, at a fair sale, is a circumstance which may go to the jury as one of the means to ascertain the value of the chattel. *Ib.* 733

WILLS AND TESTAMENTS, AND PROBATE OF.

1. A husband and wife, releasing to their children all their interest in the estate of the father of the wife, are not thereby rendered competent witnesses, in a contest upon the validity of the will of the wife's father.—*Locke v. Noland*, 249
2. The orphans' court has the power to establish the contents of a will, which has been destroyed, without the knowledge or consent of the testator, by the proof of a substantial copy of the will. *McBeth v. McBeth*, 596
3. If the will is not destroyed, but is in the possession of any one subject to the jurisdiction of the court, it should compel its production. *Ib.* 596
4. When a will is in the possession of the deceased, and is not found at his death, the legal presumption is, that he himself destroyed it, *animo revocandi*, until the contrary is shown. *Ib.* 596
5. The form of the probate of such a will, is, that it is established, until a more authentic copy can be brought in. *Ib.* 596
6. A court of equity has no jurisdiction to decide on the validity of a will, either of personal or real estate, at the instance of the heir at law. *Watson, et al. v. Bothwell, et al.* 650

WILLS AND TESTAMENTS, AND PROBATE OF—CONTINUED.

See Chancery, 13, 14.

See Evidence, 34.

See Parent and Child, 3.

WITNESS.

1. In a suit between the mortgagee of slaves and a subsequent vendee of the mortgagor, the latter is a competent witness, as his interest is balanced.
Dearing v. Windham, 204
 2. The act of 1845, rendering mortgagors, or defendants in execution incompetent witnesses in *trials of the right of property*, does not cover the case of a mortgagee suing a subsequent purchase from the mortgagor.—
Ib. 204
 3. The notice which the law requires to be given in summary proceedings, is sufficient, if it describe the debt upon which the motion is to be made with reasonable certainty. *Colgin v. The State Bank*, 222
 4. A husband and wife, releasing to their children all their interest in the estate of the father of the wife, are not thereby rendered competent witnesses, in a contest upon the validity of the will of the wife's father.—
Locke v. Noland, 249
 5. Where the testimony of a witness will have the effect to satisfy a judgment recovered against him by the plaintiff and defendant *jointly*, by making both of them liable for the payment of an account which he has against the plaintiff *individually*, he is an interested witness, and his testimony should be excluded if objected to. *Taylor v. Paullin*, 512
 6. Where a motion is made by a county treasurer, under the statute, against a clerk for not rendering an account, the treasurer is a competent witness to prove the account was not rendered, as the motion is a county prosecution in which the officer has no interest. *Douglass, et al. v. Terrell*, 583
 7. When the witness will be responsible to one of two persons, no matter which way, the verdict is a case of balanced interest as presented, and the witness competent. *Locket v. Child*, 640
 8. A bankrupt vendor who has received his certificate, and who offers to release all his interest to his grantee and assignees, and to whom a release is offered by his grantee, is a competent witness. *Frow & Ferguson v. Downman*, 880.
- See Deeds, and Registry of, 2.
See Evidence, 3.
See Right of Property, Trial of, 4.

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